S. HRG. 103–385

IMPLICATIONS OF THE FAIR LABOR STANDARDS ACT FOR INMATES, CORRECTIONAL INSTITUTIONS, PRIVATE INDUSTRY, AND LABOR

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Implications of the Fair Labor Stan... ,ING

OF THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

S. 1115

EXAMINING IMPLICATIONS OF THE FAIR LABOR STANDARDS ACT FOR INMATES, CORRECTIONAL INSTITUTIONS, PRIVATE INDUSTRY AND LABOR

OCTOBER 28, 1993

Printed for the use of the Committee on Labor and Human Resources

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IMPLICATIONS OF THE FAIR LABOR STANDARDS ACT FOR INMATES, CORRECTIONAL INSTITUTIONS, PRIVATE INDUSTRY, AND LABOR

THURSDAY, OCTOBER 28, 1993

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 2:40 p.m., in room SD–430, Dirksen Senate Office Building, Senator Edward M. Kennedy (chairman of the committee) presiding.

Present: Senators Kennedy, Simon, and Wellstone.

OPENING STATEMENT OF SENATOR KENNEDY

The CHAIRMAN. The committee will come to order.

I want to apologize to my friend and colleague Senator Reid. He is very familiar with the workings of this institution, and we are at a rather significant point in the defense authorization legislation in the conference with the House, and I apologize for being late.

I will include my statement in its entirety in the record, so that we can move directly to the testimony of Senator Reid.

[The prepared statement of Senator Kennedy follows:]

PREPARED STATEMENT OF SENATOR KENNEDY

The committee today is considering legislation to exempt prison inmates from the Fair Labor Standards Act.

This committee does not normally deal with issues involving prisons. They are usually considered by the Judiciary Committee, where I also serve. But the Labor Committee is concerned with issues involving labor standards. Our inquiry today focuses primarily on the impact of S. 1115 on the beneficiaries of those standards, which include workers throughout the country as well as prison inmates.

The sponsors of S. 1115 express concern that the Fair Labor Standards Act is not clear with respect to exempting inmates in performing maintenance work or other duties in and around the institution. They also express concern that unless the law is clarified, States will be forced into endless litigation of frivolous claims by prisoners claiming protection of the law.

Opponents of the bill insist that inmates should be covered by the Fair Labor Standards Act, to ensure that prison industries do not compete unfairly with the private sector.

For example, if the minimum wage does not apply to prisoners, then private employers operating in prison settings can undercut wages in the private sector and drive private employers out of business.

By blocking all claims for minimum wages by prison inmates, the bill before us might eliminate some frivolous claims by prisoners. But in considering this legislation, we must also consider whether it is needed and whether it is sufficiently tailored to prevent unfair competition. These are complex issues, and I look forward to the testimony of our witnesses. We will also insert at this point a statement by Senator Thurmond.

[The prepared statement of Senator Thurmond follows:]

PREPARED STATEMENT OF SENATOR THURMOND

It is a pleasure to be here this afternoon to receive testimony on S. 1115, a bill which ensures that minimum wage requirements do not apply to inmates who work for prison systems. I would like to join my colleagues in extending a warm welcome to our witnesses here today.

As you know, in the case of Hale v. Arizona, the Ninth Circuit Court of Appeals had initially ruled that prisoners who work must be paid minimum wage. Although the Court reversed itself en banc, there is still considerable confusion among our Federal Courts concerning this issue.

It is the legislative duty of Congress to ensure a similar result will not happen again. We should clarify to the courts that inmates are not entitled to protection under the Fair Labor Standards Act. This Act was not intended to be abused by the criminals in our prison system.

Mr. Chairman, we continue to require more and more from our State prison systems without providing them the funds to accomplish their tasks. If our State prison systems are required to apply the protections of the Fair Labor Standards Act to its inmates, they would be forced to pay millions of additional dollars each year for inmate labor or not be able to employ them at all.

Again, I would like to welcome our witnesses here today, and I look forward to their testimony.

The CHAIRMAN. I want to personally express my appreciation to Senator Reid for the attention which he has given to this issue. This is a matter to which he has given a great deal of thought, and he was prepared to offer legislation. We had indicated that we were prepared to have a hearing, and we had hoped to have the hearing a few weeks ago, and he has been enormously accommodating to both me personally and the members of the committee. So I appreciate very much his willingness to run through this process, and we have every intention of trying to work with him if we possibly can on this issue and other issues as well.

We are delighted to have you, Senator Reid.

STATEMENT OF HON. HARRY REID, A U.S. SENATOR FROM THE STATE OF NEVADA

Senator REID. Mr. Chairman, thank you very much.

I do know what an imposition this is to have the hearing at this time, but as you know, it is better to do it this way than to try to

bring something up on the floor without hearings. I have followed your leadership in agreeing to do it this way. This is an appropriate way to do it, where we can have some hearings, and if there are some flaws in this bill, I am happy to work with you in that regard.

The CHAIRMAN. Fine. Thank you.

Senator REID. Mr. Chairman, it seems that you and I have been doing a lot of work this week on Federal prisoners. We worked yesterday and the night before on the Religious Freedom Act and an amendment there dealing with prisoners, and I appreciate your help in that regard also.

Mr. Chairman, last year, the Ninth Circuit determined that inmates working in correctional industries are covered by the Fair Labor Standards Act. This is the case, Hale v. Arizona, infamous or famous, however you look at it.

There are many implications associated with this decision, but one of those is that prisoners are entitled to be paid minimum wage. In addition, the creation of employee status for inmates, some feel may open the door to unemployment compensation, workmen's comp, vacation, and even overtime pay.

This case, I was happy to learn, was later overturned when it was heard en banc by the Ninth Circuit. Unfortunately, that is not the end of the story. There remains confusion in the courts, even confusion within the Ninth Circuit, which covers the State of Nevada.

That is why I introduced a bill to exempt prisoners from coverage under FLSA to make it clear to the courts that they are not covered. The bill, S. 1115, is cosponsored by Senators Bryan, Dorgan, Kassebaum, Cohen, Mathews, Mack, and Graham of Florida.

I regret that legislation is necessary, but at this time, the Federal courts, as I have mentioned, are in conflict. We have State Governments already staggering from budget deficits, now being concerned that they may owe millions of dollars to prisoners for back pay, or that they will have to start paying minimum wage on future prisoner work assignments, or just terminate prisoner work assignments.

If this change is allowed to go forward, we will have prisoners who would lose their job training, lose the opportunity to be productive during their incarceration, and lose the incentive to reform themselves and return to society because the State Governments will not be able to afford these work programs.

The Fair Labor Standards Act of 1938 was enacted as a progressive measure to ensure all able-bodied working men and women a fair day's pay for a fair day's work. It was not enacted to pay incarcerated criminals the Nation's minimum wage.

Further, this Act had a humanitarian purpose: to provide a minimum standard of living necessary for health, efficiency, and the general well-being of workers.

The goals of the Act in regulating the labor of nonincarcerated workers are completely separable and distinguishable from the reasons that prisoners work.

Prisoners do not earn wages in order to pay for their room and board. The State pays for their room and board. The State has complete control over the prisoners and responsibility for the living

conditions of these prisoners. The taxpayers, I repeat, pay for their cells, that is, their room, their food, their entertainment, and we, of course, now know that they pay for cable TV as part of their entertainment, health care, and expensive dental and other kinds of medical work to which many Americans do not have access.

Taxpayers also pay for expensive law libraries so that inmates can learn how to sue the Government and tie up the court system. This is off the point, Mr. Chairman, but in our Federal court system in the State of Nevada, 40 percent of the litigation is by prisoners. Forty percent of the civil litigation is by prisoners.

So should the taxpayer also pay minimum wage and overtime to prisoners while they are having their rooms paid for, their cable TV paid for, among other things? I believe this is absurd.

My bill clarifies that the protections under the Fair Labor Standards Act were intended for hardworking individuals and not for criminals in our prisons. The amendment makes it clear that criminals are not covered by the Act and allows States to continue their successful work programs.

Federal courts are in conflict over this matter. The Ninth Circuit said in Hale v. Arizona that the Act covers prison labor and concluded that inmates are entitled to receive minimum wage for their work.

Further, the court felt that it would be an encroachment upon the legislative prerogative for a court to hold that a class of unlisted workers is excluded from the Act. Because prisoners are not specifically exempted, the court decided that they are in fact included.

As I mentioned, this was overturned, but this is being appealed to the U.S. Supreme Court. In the very same circuit, the Eastern Circuit of California, two class actions suits have been filed on behalf of State inmates who have been employed by prison industries. These actions ask for damages specified by the Fair Labor Standards Act, principally the difference between the Federal minimum wage and the wages paid to them by prison industries.

On August 30, the Eastern District denied the State of California's motion to dismiss, which was based on the Hale decision. A court within the very same circuit as Hale has thrown Hale out the window.

A letter I received from the California Attorney General's office states: "At this juncture, it appears there is no consensus as to whether FLSA covers inmates even within the circuit that issued Hale. Final resolution of this issue must rest with the U.S. Supreme Court, absent passage of your bill."

What is more, the Hale case overturned a case decided a year before in the same circuit. Confusion runs rampant in the courts on this issue, and it is Congress' duty to clarify the situation.

The Eighth Circuit found in the Wentworth v. Solem case that a working prisoner is not held to be a State employee and therefore is not entitled to minimum wages under the Act.

The Sixth Circuit has said in Sims v. Parke Davis & Co. that prisoners who work for private corporations at the prisons and are paid by the State are not covered by the Act.

The Fifth Circuit said in Alexander that prisoners were not covered, but in Watson held that they were covered, and without overruling the previous case.

The Second Circuit held in Carter that the Act may apply to inmates, but since Congress did not expressly exempt them, it would be improper for the courts to do so.

Further, Mr. Chairman, the U.S. Claims Court held in Emory that the Act does not cover Federal prison inmates.

Again, confusion, to say the least, in the courts over this issue is rampant. And we have been called upon by the Courts to dispose of this issue with legislative action in this Congress.

I asked the GAO to look into this situation. I will quote briefly from their results, and you will hear more from them later. "If the prison systems we visited were required to pay minimum wage to their inmate workers and did so without reducing the number of inmate hours worked, they would have to pay hundreds of millions of dollars more each year for inmate labor. Consequently, these prison systems generally regarded minimum wage for prisoner work as unaffordable, even if substantial user fees—for example, charges for room and board—were imposed on the inmates."

"Prison systems officials consistently identified large scale cutbacks in inmate labor as likely and, in their view, a dangerous consequence of having to pay minimum wage. They believed that less inmate work means more idle time and increased potential for violence and misconduct. They also noted other potentially adverse consequences for prison operations—for example, routine maintenance performed less frequently—and generally saw few advantages in paying minimum wage."

Therefore, paying minimum wage to prisoners would not only be expensive, but dangerous and counterproductive.

I know the argument will be made by some that if we do not pay prisoners minimum wage or eve prevailing wage, as some would argue, they will be competing for jobs that otherwise would be available to the private sector.

Most prison labor involves making items for the State, such as license plates, to help cut the cost of the prisoners' confinement. The argument that prisoners are taking jobs away from people because we do not pay them minimum wage or the prevailing wage is, I believe, a red herring.

Prisoners who work in the prison industries enhancement program will be unaffected by an exemption from FLSA. These workers, who put products into commerce and allegedly compete with the private sector, are already required to receive prevailing wages under an entirely separate law, namely, the Ashurst-Sumners Act. I repeat: The PIE program will not be affected by this exemption. The Fair Labor Standards Act and the Ashurst-Sumners Act are completely separable.

The real issue here is whether we are going to have to pay prisoners hundreds of millions of dollars every year in minimum wage and from already stressed State and Federal budgets.

The Bureau of Prisons told GAO that their industries paid 15,300 prisoners average rates of 87 cents an hour, for 27.2 million regular work hours, and $1.75 an hour for 1.8 million overtime hours worked during fiscal year 1992. This amount to $27 million

for inmate compensation, or about $100 million less than what paying minimum wage would have cost.

If we decide to pay inmates minimum wage, we can say goodbye, I believe, to prison work programs. The States will not be able to afford them, and neither will the Federal Government.

We are all concerned with teaching prisoners a skill and teaching them to be productive citizens. I agree that we need to do that, but we cannot afford to do that if we pay them minimum wage.

Mr. Chairman, during the development of this bill, I have had the opportunity to become acquainted with a Temple law student by the name of Alexander Welan. I have been contacted by Mr. Welan for information, and my staff has worked with him. He is one of the elite from Temple Law School, and he is a member of the Law Review. I asked permission of the committee, Mr. Chairman, that an article written by Mr. Welan, to be published this spring in the Temple Law Review, entitled, "Prisoners and FLSA: Can the American Taxpayer Afford Extending Prison Inmates the Federal Minimum Wage?" be included in the record of this hearing. I think it is an excellent analysis of the case law in this area.

Thank you, Mr. Chairman.

[The article referred to is retained in the files of the committee.]

The CHAIRMAN. Thank you very much for a very interesting and compelling statement.

Do you have an assessment of what percent of prison work falls into the general category of the PIE program?

Senator REID. I can talk about Nevada. In the entire United States, there are 1,200 people involved in that program, all over the country?

The CHAIRMAN. Out of 84,000, I think, who are incarcerated.

Senator REID. There are 1.2 million incarcerated in the United States.

The CHAIRMAN. Yes. In Federal, I think it is about 84,000; and it is 1.2 million, including all the State.

Senator REID. Yes.

The CHAIRMAN. And how many do you figure are involved in that program?

Senator REID. Twelve hundred.

The CHAIRMAN. So it is a very small program.

Senator REID. Very small, but a good program.

The CHAIRMAN. And are those areas which have been decided by the Bureau of Prisons, or the Department of Labor and Bureau of Prisons, as areas of commerce—as I understand, it has to go into interstate commerce.

Senator REID. That's right, and they are paid minimum wage.

The CHAIRMAN. And then do they decide within various categories of industries that they are not going to have an adverse competitive impact? Is there a procedure to follow?

Senator REID. Yes, there is a procedure.

The CHAIRMAN. I may just submit some questions. I was just interested——

Senator REID. I have had a briefing on that, but I cannot give you specific answers.

The CHAIRMAN. OK. I was trying to get a better understanding of the industries for which they do pay prevailing wage, those that have been selected and how they have been selected.

Senator REID. Mr. Chairman, in Nevada, for example, there are prisoners who work and are paid minimum wage because it goes into interstate commerce.

The CHAIRMAN. And it that outside the PIE program?

Senator REID. It is within the PIE program.

The CHAIRMAN. OK. Included in the article by the law student you referred to, they talk about the Ashurst-Sumners Act. I guess that is related to the protections of people who are in that other program.

Senator REID. That is right. And it is my understanding that my amendment would not affect that.

The CHAIRMAN. OK. Thank you.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

First of all, I want to commend our colleague for looking at this problem, which I frankly was not aware of until you brought this to your attention.

I note that Maria Echaveste, who is the administrator for the Wage and Hour Division, says "the Act applies where non-Federal inmates are employed by a covered private company or individual under contract with a penal institution to perform work, but it does not apply where inmates perform work for the incarcerating facility."

Senator REID. That is right.

Senator SIMON. Do you argue with their interpretation or how the courts have taken that?

Senator REID. Senator Simon, I believe that there is a distinction that can be made validly that those people who are engaged in activities that compete with the private sector in effect, that there is perhaps a reason to look at minimum wage in that regard.

However, if it is something that is institution-related—for example, making license plates, where they are not competing with anyone—then they should be able to pay them what they have traditionally.

Senator SIMON. So that if, for example, a prison signs a contract with, let's just say Service Master, to provide meals, if the tradition is 87 cents an hour, they could pay 87 cents an hour for meals within that facility. That is the point that I am making.

Senator REID. And the reasoning being, Senator Simon, at least as I see it, that not only is there being work provided that is helpful to the prisoners, but there is being a service rendered that is helpful to the institution.

Senator SIMON. And it is helpful to the individual. It is kind of interesting. In the field of mental health, at one point, mental health institutions generally had farms in connection with them, and then we got the idea this was not a good thing, and mental health institutions got rid of farms. Now there are people who say we made a mistake; that we need to give people the opportunity to perform work.

Senator REID. Yes, I have read some of those articles.

Senator SIMON. And I think that is certainly true for prisoners, so my knowledge is superficial and I may change my mind as I hear other witnesses, but off the top of my head, it seems to me your point is a very valid one.

Senator REID. And I know that some of my friends in the labor movement oppose this legislation, but I say to my friends in the labor movement that these are jobs that no crafts would organize in them anyway. It is my feeling that they could be better spending their time, with all due respect, organizing the waitresses in Nevada or something.

Senator SIMON. I am for organizing the waitresses in Nevada, yes.

The CHAIRMAN. In listening to your response to Senator Simon, your language here points out the term "employee"—that would be the employee under the FLSA—does not include any inmate of a penal or correctional institution of the Federal Government, DC., State, or political. This language would include anyone at all, as I read it, rather than those who——

Senator REID. If that is the case, Mr. Chairman, I would be happy to take a look at it. I acknowledge there are areas where they should not—it should not be a blanket exemption.

The CHAIRMAN. You have identified some. I think we are getting very close to it, and that would make an important difference.

Thank you very, very much.

Senator REID. Thank you, Mr. Chairman.

The CHAIRMAN. The second panel consists of Government agencies. Ms. Gibson is associate general counsel at the Government Accounting Office, and she is accompanied by James Blume, the assistant director of the General Government Division of GAO, who will testify on the report of the GAO.

Ms. Echaveste is the wage and hour administrator within the Department of Labor, and she is testifying before our committee for the first time. We look forward to working with her on all the wage and hour issues.

The Department of Justice has submitted written testimony as well.

[The prepared statement of Ms. Anthony follows:]

PREPARED STATEMENT OF SHEILA F. ANTHONY, ASSISTANT ATTORNEY GENERAL FOR LEGISLATIVE AFFAIRS, U.S. DEPARTMENT OF JUSTICE

Thank you for the opportunity to present the views of the Department of Justice on prison labor generally and S. 1115 specifically, which would specify that the Fair Labor Standards Act of 1938 (FLSA) does not apply to inmates. At least to the extent outlined below, the Department supports the general thrust of S. 1115, which would add prisoners to the list of persons explicitly exempted from coverage by the FLSA. However, the Department finds S. 1115's exemption of prisoners to be overbroad.

Currently, the FLSA does not apply to most prison labor situations.[1] Most Federal prison labor occurs in the context of work performed on prison grounds—either routine maintenance around the institution or work for Federal Prison Industries (FPI), the Bureau of Prison's (BOP) most important penal correctional program. The FLSA has not been found to be applicable to Federal prisoners performing routine maintenance around the institution or working for FPI because no employer-em-

[1] The FLSA covers employees engaged in interstate commerce or in the production of goods for interstate commerce, and all employees of certain enterprises.

ployee relationship exists between the prison and the inmate, or FPI and the inmate.

When a Federal or non-Federal prisoner works in a covered activity, such as through a work release program outside the prison grounds, the minimum wage requirements of the FLSA do and should apply. In those cases, the prisoners are in an employer-employee relationship for purposes of the FLSA.

The Department has traditionally opposed any attempt to apply the FLSA to Federal prisoners in general, and we remain opposed today to expanding the coverage of the Act. The Department believes that, for the most part, current laws adequately address the employment of prisoners in prison industries and thus legislation amending the FLSA is not necessary at this time.

The Ashurst-Sumners Act, 18 U.S.C., section 1761, generally prohibits the transportation of goods manufactured by prisoners in interstate commerce (except prisoners on parole, supervised release, or probation). The maximum penalty for a violation of section 1761 is a $50,000 fine and imprisonment for 2 years. Goods made by Federal prisoners for FPI are sold only to government entities.

FPI, the BOP's most effective correctional management program, is a Federal Government corporation established by Congress in 1934 to employ and train inmates. FPI provides inmates with valuable training opportunities, creates a work ethic and prepared inmates for reintegration into the community. A recent BOP study, the Post Release Employment (PREP) project, confirmed that inmates who participate in FPI work programs are better adjusted while incarcerated and have better post-release performance than inmates who did not participate in FPI.

FPI operates 93 factories at 51 prisons and employs approximately 16,000 inmates. Fiscal year 1992 sales to Federal departments and agencies totaled $437 million. To avoid undue impact on any single private sector industry, FPI producers over 150 different products. FPI's traditional industries are textiles, apparel, electronic components, and furniture.

Non-Federal prison industries generally may sell goods or provide services in interstate commerce only if they do so as a part of the Prison Industry Enhancement (PIE) Certification Program, which the Department's office of Justice Programs (OJP) oversees.[2] PIE's authorizing statute—section 827 of the Justice System Improvement Act of 1979, P.L. 96–157; and section 819 of the Justice Assistance Act of 1984, P.L. 98–473—specifically exempts participating projects from the Ashurst-Sumners Act. If a State prison industry sells goods in interstate commerce without certification or in violation of a certification under the PIE program, that industry would be subject to criminal penalties under the Ashurst-Sumners Act.

Once OJP certifies a State as qualified to participate in the program, that State may designate specific PIE projects. Under this unique program, private industries establish joint ventures with State correctional agencies to produce goods and services using prison labor. State prisoners who volunteer to participate must be paid comparable wages for the type of work performed. However, this requirement is pursuant to PIE's authorizing statute. Deductions of up to 80 percent of gross wages may be made from wages earned for room and board, taxes, family support, and victim compensation.

As currently drafted, S. 1115 would reverse several appellate decisions, including Carter v. Dutchess Community College, a 1984 decision by the U.S. Court of Appeals for the Second Circuit, that have created uncertainty about the application of the FLSA to prison labor. The Second Circuit expressly noted that section 13 of the FLSA contains an extensive list of workers who are exempted from FLSA coverage which does not include prisoners. S. 1115 would add inmates to that list, although the Department believes it would do so in an overbroad manner.

S. 1115 would exempt all prisoners from the FLSA, even those working off prison grounds in supervised release programs. S. 1115 unfortunately might preclude payment of the minimum wage in those circumstances. However, not all prisoners working off prison grounds are entitled to FLSA coverage. For example, 18 U.S. C. section 4125(a) authorizes inmates to be made available to heads of departments, such as inmates cleaning up parks for the Forest Service. The Federal Government should be able to continue using prison labor for these kinds of projects without having to pay the inmates minimum wage. Thus, if the committee moves forward with legislation explicitly exempting prisoners from the FLSA, such legislation should take into account these special government project situations.

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[2] State prison industries may sell goods to other States pursuant to Section 1761(b), absent State legislation prohibiting such sales. However, the Walsh-Healey Public Contracts Act, 41 U.S.C. section 35, generally bars State prison industries from selling prisoner-made goods to the Federal Government.

The committee has also asked the department to comment on the relationship between the FLSA and the Ashurst-Sumners Act, 18 U.S.C. section 1761, which prohibits the shipment in interstate commerce of prison-made goods. We note that, unlike the FLSA, the scope of section 1761 does not appear to include the provision of services in interstate commerce.

Investigations into potential violations of the Ashurst-Sumners Act are conducted by the FBI. Where warranted, the FBI refers appropriate matters to U.S. Attorneys' offices for prosecution. Since 1991, the FBI has investigated only three potential section 1761 violations. One pending investigation was closed this year without further action. In 1992, one investigation resulted in the prosecution and entry of a guilty plea in the Western District of Michigan. However, that case involved the importation of machine presses that had been manufactured by convicts and prisoners in the People's Republic of China into the United States from China. In that case, the E.W. Bliss Company was fined $75,000 and all of the machine presses were seized. Currently, one investigation is pending in the Eastern District of Michigan, and no prosecutions are underway.

The small number of cases under this statute is not surprising. It was enacted to avoid jeopardizing jobs in the private sector by producing goods by persons working for wages below those set by the FLSA. By and large, the States comply with this provision and ensure that goods made by their prisoners for sale in commerce are made in accordance with the PIE program.

Thus, section 1761 acts as a complement to the FLSA, but the criminal sanctions of section 1761 are rarely necessary. I should add that the Office of Justice Programs, the component of the department that oversees the PIE program, has no record of receiving any complaints from either prisoners or businesses about prisoner wages or unfair competition since the program's inception in 1979.

The department believes that both Federal and non-Federal prison industry programs generally are following the requirements of the Ashurst-Sumners Act. We stand ready to enforce vigorously violations of that Act. We will be happy to work with the committee should it decide to pursue legislation affecting inmates in prison industry programs.

The CHAIRMAN. Ms. Echaveste, we would be delighted to hear from you.

STATEMENTS OF MARIA ECHAVESTE, WAGE AND HOUR ADMINISTRATOR, U.S. DEPARTMENT OF LABOR; AND LYNN GIBSON, ASSOCIATE GENERAL COUNSEL, U.S. GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY JAMES BLUME, ASSISTANT DIRECTOR OF THE GENERAL GOVERNMENT DIVISION, GAO

Ms. ECHAVESTE. Good afternoon, Mr. Chairman.

Thank you for the opportunity to appear before you to discuss application of the Fair Labor Standards Act to prison inmates and to offer the administration's views on Senator Reid's bill.

I was very encouraged by the Senator's comments with respect to perhaps narrowing the language, because I think we are very close.

The comments that I will bring to you today fall into three general categories. They are more fully discussed in the written statement that we provided to you. I would like to discuss generally the Department of Labor's enforcement policy; second, the current State of the law—I think Senator Reid's comments about the flux and controversy are quite accurate—and third, the relationship of other Federal laws.

As you are all well aware, the Fair Labor Standards Act was enacted by Congress in part and has the very basic premise to eliminate unfair competition based upon substandard minimum wages or work conditions, and it requires all covered employers to pay a minimum wage of $4.25 and also to pay overtime for hours worked in excess of 40 hours per work week.

The Act also permits private action by individuals to recover unpaid wages as well as liquidated damages. Section 13 of the Act provides for specific exemptions. It does not include prisoners.

The Department, when it analyzes whether the FLSA applies, engages in a four-part analysis, the economic reality test. It looks to see whether the employer has the power to hire and fire the employee; whether the employer supervises and controls the working conditions of the employee; whether the employer determines the rate and method of payments; and last, whether the employer maintains employment records. That is the framework which the Department utilizes in analyzing whether prisoners in State institutions and local institutions are covered.

We should note that Federal prisoners are not covered by the FLSA. That has to do both with court law and standing policy.

In State institutions, I want to State very clearly that the Department's policy is that when the inmate performs work for the institution, such as cleaning, laundry, kitchen work, the FLSA does not apply. We view that work as relating to the purposes of incarceration, and therefore the State is not an employer, and therefore you do not have the necessary employer-employee relationship.

I would also like to note that the GAO report noted that currently, approximately only 8 percent of the prison population is engaged in industry type of programs. Looked at another way, over 90 percent of the prison population is looking for the State or the local prison in the type of work where the FLSA would not apply.

Nonetheless, in those instances where prison inmates work for private contractors or individuals who have contracted with the State institution for use of prison labor, it is the policy of the Department that the FLSA applies. And the reason for that is to eliminate the unfair competition in interstate commerce that would result by the use of such substandard wages.

Turning to the current status of the law, there is no question that there are a number of cases taking contradictory views. Some courts have found that prisoners are not covered because their work is not part of an employment contract. Other courts have held that the FLSA does not apply because the FLSA was enacted to protect living standards of employees, and that clearly does not apply with respect to prisoners.

In contrast, certain courts have found that prisoners are covered because the FLSA did not specifically exclude them, or that the economic reality test utilized by the Department would cause the prisoners to be covered by the FLSA.

Turning to other Federal laws and other DOL programs, under the Davis-Bacon and the Service Contract Act, prisoners are treated as covered employees when they are employed by contractors, and that follows from the initial enforcement policy I just outlined; and under the Walsh-Healy Public Contracts Act, which prohibits employment of prisoners except under certain conditions and also prohibits the sale of prisoner-made goods to the Federal Government.

Some reference has been made to the PIE program. In this respect, I would like to answer a question that I think some of us have, which is, well, if the PIE program, which prohibits the sale of goods in interstate commerce, protects wages, which requires the

payment of minimum wage or prevailing wage, then why do you need the FLSA?

The answer is, I think, that it does not cover all of the type of private industry that is starting to develop in the prisons. It does not cover services. There is a growing trend for the use of prisoners in telemarketing and reservation 800 numbers, and under the PIE program that would not be covered. So we see a need for the protections of the FLSA.

With respect to Senator Reid's bill, based upon his comments about whether in fact we need that broad exemption as he had originally proposed, I think there is an opportunity to craft legislation that would keep the goal of the Fair Labor Standards Act as well as balance the fact that prisoners are in prison for crimes that have been committed, that our society has an interest in punishing, that we wish them to be productively occupied. I look forward to working with the committee and with the Senator to develop some type of legislation to address this problem.

The CHAIRMAN. Very good. Thank you.

[The prepared statement of Ms. Echaveste follows:]

PREPARED STATEMENT OF MARIA ECHAVESTE

Mr. Chairman and members of the committee, thank you for the opportunity to appear today to discuss the application of the Fair Labor Standards Act (FLSA) to prison inmates and to offer the Administration's views on Senator Reid's Bill—S. 1115—to exempt prison inmates from the coverage of the Act. In doing so, I will discuss the Department of Labor's (DOL) policy in applying the FLSA to inmates in employment situations, the current state of the law, and how other Federal laws and programs treat inmates in such situations.

While I will discuss DOL's policy in applying the FLSA to inmates in more detail later in my testimony, our interpretation of the Act is that it applies where non-Federal inmates are employed by a covered private company or individual under contract with the penal institution to perform work, but that it does not apply where inmates perform work for the incarcerating facility.[1] This policy is consistent with and intended to ensure that an important Congressional intent in enacting the FLSA—to eliminate unfair competition in interstate commerce based on sub-standard wages and working conditions—is fulfilled.

It should be clear, however, that this policy does not jeopardize prison industry programs and the very important purposes they serve. Additionally, our enforcement policy is certainly not meant to create a financial windfall of sorts for inmates who have forfeited their freedom because of crimes against society.

The question of whether and how the FLSA applies to prison inmates has been addressed by the courts on different occasions over the years and has resulted in varied and inconclusive decisions. Most recently, the en banc decision of the Ninth Circuit Court of Appeals in Hale v. Arizona[2] held that inmates who worked for a private enterprise component of Arizona's prison industries, pursuant to the State's requirement that prisoners work at hard labor, were not employees of the State and therefore, not covered by the FLSA. The Court, however, refused to "agree that the FLSA categorically excludes all labor of any inmate." The Hale decision, in discussing the holdings of other Circuits, highlights the controversy in this area. A petition for certiorari is pending before the United States Supreme Court and this controversy may be resolved if the Court agrees to review the case.

In addition to the uncertainty caused by the inconsistent court opinions, there is significant concern among prison officials, as exemplified in a recent General Accounting Office report, about the potential costs associated with having to meet the Act's requirements for inmates in prison industry programs, and any impact on the continued viability of these programs.

Given recent developments in our prison systems and the case law in this area, application of the FLSA to prison inmates has become a complex and controversial matter; one that may, in fact, best be resolved through legislation. If this Committee

[1] DOL has no jurisdiction under the FLSA over most Federal employees.
[2] 993 F.2d 1387 (9th Cir. 1993) (en banc).

decides that it wishes to pursue this approach, I can convey the Administration's commitment to assist and cooperate in that effort.

Before presenting our views on Senator Reid's legislative proposal, it may be useful to review the FLSA, both in terms of how the Department has applied it and how the FLSA fits in with other Federal legislation that pertains to prison inmates in work situations.

FAIR LABOR STANDARDS ACT

The FLSA is, as you know, the Federal law of most general application concerning wages and hours of work. This law requires, among other things, that all nonexempt employees of covered employers must be paid a minimum wage of $4.25 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. The Act also prescribes, among other things, employer recordkeeping requirements.

Under the FLSA, the Secretary of Labor may bring an action in court to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. Significantly, an employee also has the right to bring an independent, private action for recovery of unpaid minimum wages, unpaid overtime compensation, liquidated damages, and attorneys' fees. Like the Secretary, an employee may seek equitable relief as well (including employment, reinstatement, promotion and the payment of lost wages) where an employer has discriminated against the employee for filing a complaint or instituting a proceeding under the Act. A private right of action is an important mechanism for achieving compliance with the Act, allowing employees to ensure their rights under the Act as a supplement to DOL enforcement efforts.

Congress enacted the FLSA in recognition of the fact that in industries engaged in commerce or in the production of goods for commerce, the existence of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers: (1) causes commerce to spread and perpetuate such labor conditions; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and, (5) interferes with the orderly and fair marketing of goods in commerce. Congress enacted the FLSA not only to improve living conditions and the general well-being of U.S. workers, but also to eliminate unfair competition amonq employers in interstate commerce. based upon substandard wages and working conditions. This has been an important consideration in our policy in applying the FLSA to prisoners in work situations, as well as in other recent Congressional enactments in this area.

The FLSA covers employees individually engaged in interstate commerce or in the production of goods for interstate commerce, and all employees of certain enterprises. The FLSA is silent, however, on whether prisoners are "employees," and whether they can work in a covered employment relationship. However, the Act does not include prison inmates among the categories of "employees" specifically exempted from its requirements. The Supreme Court has found that since the FLSA specifically lists categories of workers who are excluded from the Act, employees not so excluded remain covered.[3]

A threshold issue for establishing the applicability of the FLSA, which is especially relevant to prisoners, is whether an employment relationship exists and whether a person who works is an "employee" employed by an "employer" within the meaning of the Act. To determine the existence of an employment relationship, the Department examines the underlying "economic reality" of the work situation.

Under the "economic reality test" adopted by the courts, the existence of an employment relationship generally depends upon considerations such as whether the alleged employer (1) has the power to hire and fire the employees, (2) supervises and controls employee work schedules or conditions of employment, (3) determines the rate and method of payment, and (4) maintains employment records.[4] A number of courts have found non-Federal inmates to be employees under the FLSA under certain circumstances.[5] In Carter v. Dutchess Community College,[6] the Second Circuit Court of Appeals found that an inmate conducting tutorial classes at a prison,

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[3] Powell v. United Staes Cartridge Co., 339 U.S. 497 (1950)

[4] Bonnette v. California Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983).

[5] The courts that have addressed the issue have found that Federal prisoners are not "employees" under the Act. Emory v. United States, 2 Cl. Ct. 579, aff'd without opionion, 727 F.2d 1119 (Fed. Cir. 1983); see also Amos v. United States, 13 Cl. Ct. 442, 445-46 (1987).

[6] 735 F.2d 8 (2d Cir. 1984).

in a program conducted by Dutchess Community College, could be an employee under the FLSA. The Second Circuit rejected the proposition that no employment relationship could exist as a matter of law based on inmate status, and remanded the case for further fact finding using the economic reality test as a guideline.

The Carter Court gave three reasons for specifically rejecting a blanket exemption of prisoners from the protection of the FLSA. First, such an exemption could create unfair competition with workers looking for jobs, and would have the potential for upsetting the desired equilibrium in the workplace. Second, prisoners are not included on the extensive list of workers whom Congress expressly exempted from coverage in section 13 of the FLSA and Congress must be presumed to be aware of and approve of the use of the economic reality test. Finally, even those courts which had barred prisoners from coverage had done so only after a particularized inquiry into the facts of each case.

Two other Circuits have concluded that the FLSA may apply to non-Federal prison inmates either because the FLSA does not specifically exempt them,[7] or because the employment relationship met the economic reality test.[8] Other courts, however, have found that prisoners are not "employees" for purposes of the Act.[9] These courts generally cite three basic reasons for their holdings: (1) the inmate's work is not the result of a bargained for employment contract, but rather is the result of, and incidental to, his or her incarceration; (2) Congressional concern in enacting the FLSA was with the standard of living and general well-being of workers in American industry, so that the extension of the FLSA to prison inmates presumably would not affect their standard of living and was not legislatively contemplated; and, (3) if prisoners were covered by the FLSA, it would make the provisions of the Ashurst-Sumners Act, discussed below, largely superfluous.

With this background and the state of the law in mind, let me expand on our current policy. It is our view that prison inmates were not intended to be covered by the FLSA for work done for the incarcerating facility or pursuant to Federal Government projects such as those authorized by 18 U.S.C. section 4125(a).[10] It has been DOL's position that a prison inmate who, while serving a sentence, does work which serves the institution—for example, on prison farms, roadgangs, kitchens, laundries, or other areas directly associated with the incarceration program—is not an employee within the meaning of the Act. Therefore, such workers are not covered by the FLSA and do not have to be paid in accordance with its monetary provisions.

A different situation exists where inmates perform work for a covered private company or individual, such as a company under contract with the prison—for example, to do such things as manufacture brooms, or process vegetables and salads for sale to hotels and restaurants. In such instances an employer-employee relationship is created between the covered private company or individual and the prisoners where the economic reality test is met. This is the case whether the work is performed inside or outside of the institution. Once the coverage requirements of the Act are met, the private company or individual is required to comply with the Act in employing the inmate. Our policy in applying the Act in these non-Federal inmate work situations is in accordance with Congress' intent to eliminate unfair competition in interstate commerce.

As I will discuss in a moment, this interpretation is fully consistent with other Congressional enactments, some quite recent.

OTHER FEDERAL LEGISLATION

The treatment of prison inmates under the FLSA must also be viewed in light of the way certain other Federal statutes and programs treat them in work situations. Let me briefly mention these laws and programs.

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[7] Vanskike v. Peters, 974 F.2d 806, 808 (7th Cir. 1992) ("We do not question the conclusion []—that prisoners are not categorically excluded from the FLSA's coverage simply because they are prisoners.") "Because Vanskike's allegations reveal that he worked in the prison and for the [Department of Corrections] pursuant to penological work assignments, the economic reality is that he was not an 'employee' under the FLSA." Id. at 810.

[8] Watson v. Graves, 909 F.2d 1549 (5th Cir. 1990) (p[prisoners gaining trusty status in a Louisiana jail and working with permission of the sheriff outside the jail for a private employer found to have employee status).

[9] Harker v. State Youth Industries, 990 F.2d 131 (4th Cir. 1993); Miller v. Dukakis, 961 F.2d 7 (1st Cir. 1992); Alexander v. Sara, Inc., 559 F. Supp. 42 (M.D. La.), aff'd per curiam, 721 F.2d 149 (5th Cir. 1983); Sims v. Parke Davis & Co., 334 F. Supp 774 (E.D. Mich. 1970), aff'd per curiam, 453 F.2d 1259 (6th Cir. 1971), cert. denied, 405 U.S. 978 (1972).

[10] This also includes tasks performed by inmates as part of treatment, rehabilitation or vocational training.

Other Acts administered by DOL and other Federal agencies afford protections aimed at exploitation of prisoners in work situations.[11] The Davis-Bacon Act (DBA)[12] requires that all contractors and subcontractors performing on Federal construction contracts, and most contractors or subcontractors performing on federally-assisted construction contracts in excess of $2,000 pay their laborers and mechanics not less than the prevailing wage rate as determined by the Secretary of Labor. The McNamara-O'Hara Service Contract Act (SCA)[13] requires that contractors and subcontractors, on contracts in excess of $2,500, which furnish services to the U.S. Government, pay their employees not less than the prevailing wage rate. Under these Acts,[14] prisoners are treated as covered employees when they are employed by contractors.

The Walsh-Healey Public Contracts Act (PCA)[15] which DOL also administers, requires contractors with contracts in excess of $10,000 for the manufacturing or furnishing of materials, supplies, or equipment for the United States Government, to pay employees on the contract the Federal minimum wage and one and one-half times their regular rate of pay for all hours worked over 40 in a workweek. The Act prohibits the employment of convicts, except under certain conditions, and generally prohibits the sale of prisoner-made goods to the Federal Government.[16]

In addition, under the Ashurst-Sumners Act,[17] it is a criminal offense to transport prison-made goods in interstate commerce, with certain exceptions, unless the employer meets specified labor standards and is participating in a special program administered by the U.S. Department of Justice. The program—the Private Sector Prison Industry Enhancement (PIE) Certification Program—applies to inmates of State prisons. It is intended to encourage the employment of prison inmates, under controlled conditions to avoid adverse impact on commerce and employment, as a component of inmate rehabilitation during incarceration, and provides an important exception to these prohibitions on the use of prison labor.

Under the PIE Program, inmates participate voluntarily and must receive wages comparable to that paid for work of a similar nature in the locality where the work is performed. If inmates agree to participate in the program, their wages may be reduced by up to 80 percent of gross income for taxes, reasonable charges for room and board, allocations for support of family, and contributions to lawful funds to compensate crime victims. In addition, the inmates may receive other employment-related benefits, such as workers' compensation (except they cannot qualify for unemployment compensation while incarcerated).

Congress expanded the PIE Program in 1990 in recognition of the important purposes it serves: (1) reducing the cost of incarceration; (2) providing an effective means of occupying the growing prison population; (3) reducing inmate idleness; (4) providing a means of partial reparation to victims of crime; (5) offering inmates opportunity for rehabilitation and marketable skills; and, (6) providing inmates a means of meeting financial obligations while incarcerated.

While the existence of the comparable wage requirement under the PIE program may seem to negate the need for FLSA coverage of prisoners, the existence of such comparable wage requirement does not, in and of itself, ensure compliance. Where there is compliance, one could reasonably assume that the comparable wage would be equal to or higher than the FLSA minimum wage. Thus, there should be no cost impact insofar as meeting the FLSA minimum wage. There is, however, no private cause of action available under the PIE Program through which a remedy can be obtained as there is under the FLSA. Instead, the enforcement mechanism is available pursuant to the criminal provisions of the Ashurst-Sumners Act.

Employment and training opportunities are provided to Federal prison inmates during their incarceration by Federal Prison Industries (FPI), a wholly-owned gov-

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[11] For example, the "whitleblower" protection provisions of various environmental statutes and Article XX, subparagraph 1(e) of the General Agreement on Tariffs and Trade.

[12] 40 U.S.C. section 276(a).

[13] 41 U.S.C. sections 351 et seq.

[14] While these Acts do not directly prohibit the use of convict labor, conditional limitations do apply to convict labor on Federal contracts to protect against their exploitation and unfair competition. Exec. Order No. 11,755, 39 Fed. Reg. 779 (1973), as amended by Exec. Order No. 12,608, 52 Fed. Reg. 34617 (1987).

[15] 41 U.S.C. sections 35 et seq.

[16] Section 1(d) of the PCA provides a conditional exemption from the constraints on the employment of prisoners where: (1) representatives of local union central bodies or similar labor organizations are consulted before a qualifying project is initiated; and, (2) the paid inmate employment will not displace employed workers or be applied in skills, crafts or trade with local surplus of available gainful labor, or impair existing contracts for services.

[17] Ch. 412, 49 Stat. 494 (1935) (18 U.S.C. sections 1761–1762).

ernment corporation.[18] FPI, which is by law limited to selling its prisoner-made goods to the Federal Government, produces over 150 different products to minimize impact on any single private sector industry. Its products include a range of items, such as furniture, electronics, textiles and graphics.

Federal prisoners do not have the option of working. They must work for either the Federal Bureau of Prisons or for FPI, and refusal to work is a violation of Bureau of Prison rules. All physically fit inmates are assigned work by FPI and as such, their work can be considered part of the incarceration program. The FPI Program is considered a critical component of overall Federal prison management because it: (1) provides prisoners with a means of learning basic work ethics, job skills, and personal discipline; (2) keeps them constructively active in an otherwise potentially explosive environment within the over-crowded Federal prison system; and, (3) offers inmates one method of rehabilitation for re-entry into society.

Now that I have concluded my testimony on the treatment of prisoners under other Federal legislation, I will address Senator Reid's bill.

SENATOR REID'S BILL

As I noted at the outset, the Administration would be pleased to work with this committee if it wishes to explore legislation to address the application of the FLSA to prison inmates. I must state, however, that the Administration does not support elimination of FLSA coverage of non-Federal inmates who perform work for covered private companies or individuals. To do so would, we believe, undermine a fundamental purpose of the FLSA—to eliminate unfair competition in interstate commerce by employers based on substandard wages and working conditions—and be inconsistent with other Congressional enactments that clearly support this purpose. Consistent with DOL's position, private contractors using prison labor should not be permitted to pay little or no wages, thereby gaining significant competitive advantage over other enterprises. Thus, the Administration cannot support the FLSA exemption approach as embodied in Senator Reid's bill.

Having said this, however, I believe it would be possible to preserve the purpose of our FLSA policy while also addressing concerns about the impact of this policy on prison industry programs.

One alternative might be to craft legislation to require private contractors to pay to the prison system at least the amount required by the minimum wage and overtime provisions of the FLSA for hours worked by prisoners, thus eliminating any unfair competitive advantage the contractor might enjoy through its use of prison labor. In addition to compensating the prison laborers at some level, perhaps a subminimum wage, to avoid potential exploitation, monies paid by the contractor to the prison system could be used for such purposes as those contemplated by the PIE Program—to deposit into a fund to compensate crime victims, to improve prison conditions or expand facilities, or to build accounts for the prisoner worker's use on release from incarceration.

Mr. Chairman, the Administration Will be more than happy to work with you, the members of this committee, and Senator Reid to further develop these and other ideas should you deem that warranted.

This concludes my prepared statement. I would be happy to respond to any questions.

The CHAIRMAN. Ms. Gibson.

Ms. GIBSON. I would like to begin, if I may, by introducing my colleague. This is Mr. James Blume. He is an assistant director in our General Government Division, and he headed up our review.

Also, I would just like to give a very short summary of my statement, with permission to enter the full text into the record.

The CHAIRMAN. Yes. All the statements in their entirety will be included in the record as if read.

Ms. GIBSON. Thank you.

I am pleased to be here today to discuss our recent report to Senator Reid entitled, "Prisoner Labor: Perspectives on Paying the Federal Minimum Wage."

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[18] This program was created by and is regulated under 18 U.S.C. sections 4121–4129. As noted earlier, courts have found that Federal prisoners in general, as well as those in the FPI Program, are not covered by the FLSA. Nor are they covered by the DBA and SCA because they are not employed by Federal contractors.

Senator Reid requested that we examine potential fiscal and other impacts on the Nation's prisons if they were required to pay the minimum wage for prisoner work. The Senator's request was prompted by the Ninth Circuit panel decision in Hale v. Arizona issued in June 1992.

This decision, which was overturned after we completed our work, held that certain prisoners working in prison-operated industry were subject to the minimum wage provisions of the Fair Labor Standards Act.

At Senator Reid's request, we compared the existing wages of inmates doing maintenance and industry work for prisons with the amounts they would be paid at the minimum wage; we obtained the views of Federal and State prison officials on how paying the minimum wage to these workers would potentially affect prison systems; and also, we obtained the views of organized labor and other organizations likely to have a perspective on pay for inmate work.

To do our work, we visited five prison systems. We went to the Federal Bureau of Prisons, and we visited the State systems in Nevada, Arizona, Florida, and Virginia. We obtained information from each system on what existing inmate work would cost if paid at the minimum wage, and we asked the systems to identify potential effects of paying the minimum wage on their systems.

In addition, we surveyed 15 other States to get their views on the potential effects of paying their inmate work force the minimum wage. Finally, we discussed inmate work and pay issues with selected organizations having a stake, having different views on those issues.

In brief, our principal findings were as follows. First, for the most part, inmates in the Federal and four State prison systems we visited either were not paid wages or they were paid at rates that were substantially less than the Federal minimum wage. If the five prison systems we visited were required to pay the minimum wage to their inmate workers and did so without reducing the number of inmate hours worked, they would have to pay hundreds of millions of dollars more each year for inmate labor.

Consequently, these prison systems generally regarded minimum wage for prisoner work as unaffordable, even if substantial user fees, such as charges for room and board, were imposed on the inmates.

Second, all 20 prison systems we contacted believed that paying the minimum wages to inmate workers could have adverse effects on their systems. For example, all of the systems told us they would be forced to cut back substantially on their inmate work forces and that reduced inmate work would lead to more idle time and an increased potential for violence and misconduct.

The CHAIRMAN. Excuse me, Ms. Gibson. I apologize, but there is a vote on, so we will have a very short recess and then resume and hear the remainder of your testimony.

[Short recess.]

Senator Wellstone [presiding.] The committee will come to order. I apologize for the delay with the votes.

Ms. Gibson, I believe you were in the middle of your testimony.

Ms. GIBSON. Yes, I was.

Senator WELLSTONE. And you know Jewish guilt—I feel terrible about that. [Laughter.]

Ms. GIBSON. Well, I certainly understand, and actually, I can just say a few words and complete my statement.

As I mentioned previously in my testimony, for the third aspect of our review, we spoke with organizations, and we reviewed different studies offering somewhat different perspectives on inmate work and pay. Some of these sources emphasized improvement of inmate work programs and inmate pay through greater use of prison industry programs. These programs could be operated by or operate like private sector business. A basic premise behind this approach is that prison work experiences should be more like those in the general public and should be compensated at prevailing wage rates.

Some other organizations believe that prison industries gain an unfair competitive advantage by paying inmates less than the prevailing wage for similar work in the private sector. For example, the AFL-CIO's position is that prison labor programs should pay wages at prevailing rates in order to avoid competing unfairly with private business and displacing workers who are not imprisoned.

This concludes my statement. I would be happy to answer any questions you may have.

[The prepared statement of Ms. Gibson follows:]

PREPARED STATEMENT OF LYNN H. GIBSON

GAO's testimony is based on its report—Prisoner Labor: Perspectives on Paving the Federal Minimum Wage (GAO/GGD-93-98, May 20, 1993). Inmate work is a major part of the corrections system's effort to operate prisons safely. Inmate labor also reduces prison costs. Generally, sentenced inmates are expected to perform some type of institution maintenance work (e.g., cooking inmate meals, laundering inmate clothing, and maintaining the grounds) or industrial work (e.g. manufacturing office furniture and automobile tags) for sale to government agencies and sometimes to the private sector. According to an American Correctional Association survey, about 8 percent of the federal and state prisoners had industry type jobs.

The Fair Labor Standards Act, which generally requires employers to pay at least the statutorily-mandated minimum hourly wage to employees, does not specifically address whether prisoners performing work are "employees" entitled to the minimum wage. However, the courts have generally held that prisoners working in prison are not entitled to the minimum wage.

For the most part, inmates in the five prison systems—BOP, Arizona, Florida, Nevada, and Virginia—GAO visited either were not paid or were paid at rates that were substantially less than the Federal minimum wage of $4.25 an hour. For example, BOP generally pays its maintenance inmates 12 to 40 cents per hour and its industry inmates 23 cents to $1.15 per hour. Our analysis of data from the Justice Department and others indicated that the Nation's other prison systems had similar pay rates for their inmate workers. For example, a nationwide survey done by the Justice Department indicated that prison industry inmates were generally paid a regular rate of less than $1 an hour during 1991.

If the five prison systems GAO visited were required to pay minimum wage to their inmate workers and did so without reducing the number of inmate hours worked, they would have to pay hundreds of millions of dollars more each year for inmate labor. Consequently, these prison systems generally regarded minimum wage for prisoner work as unaffordable, even if substantial user fees (e.g., charges for room and board) were imposed on the inmates. Officials from the 20 prison systems GAO contacted consistently identified large-scale cutbacks in inmate labor as a likely and, in their view, dangerous consequence of having to pay minimum wage. They believed that less inmate work would mean more idle time and increased potential for violence and misconduct.

On the other hand, some of the organizations GAO visited had a different perspective on inmate pay, based on the idea that prison work experiences should be more like those in the general public. Some organizations also believed that by not paying

inmates minimum or prevailing wages, prison industries gain an unfair competitive advantage and/or displace workers who are not imprisoned.

Mr. Chairman and members of the committee, I am pleased to be here to discuss our recent report to Senator Reid entitled Prisoner Labor: Perspectives on Paying the Federal Minimum Wage (GAO/GGD-93-98, May 20, 1993).

Senator Reid requested information on potential effects on prison work programs and potential fiscal impacts if the Nation's prisons were required to pay minimum wage for prisoner work. His request was prompted by a decision of a three-judge panel of the U.S. Court of Appeals for the 9th Circuit which held that certain prisoners were subject to the minimum wage provisions of the Fair Labor Standards Act (FLSA).[1] This decision was subsequently reversed by the full court.[2]

In response to Senator Reid's request, we (1) compared inmates' labor wages to minimum wages; (2) obtained views of Federal and State prison officials on how the minimum wage would potentially affect prison systems; and (3) obtained views of organized labor and other organizations likely to have perspectives on paying prisoners the minimum wage. To do this, we (1) visited five prison systems—Federal Bureau of Prisons (BOP), Arizona, Florida, Nevada, and Virginia—to obtain information on inmate work and pay policies, actual hours worked and wages paid, what existing work would cost if paid at the minimum wage, and potential effects of payment of the minimum wage on prison work and operations; (2) surveyed 15 other prison systems on potential effects of payment of the minimum wage on prison work and operations; and (3) contacted selected organizations representing various groups likely to have perspectives on the issue of payment of the minimum wage for inmate work. In each of the four States we visited, we also visited a state and a federal prison. Our data are not projectable to all prison systems. The opinions we obtained on impact are subjective and projections for cost impacts are approximations.

If the Federal and four State prison systems we visited were required to pay the minimum wage to their inmate workers and did so without reducing the number of inmate hours worked, they would have to pay hundreds of millions of dollars more each year for inmate labor. Consequently, these prison systems generally regarded minimum wage for prisoner work as unaffordable, even if substantial user fees, such as charges for room and board, were imposed on the inmates.

Prison systems officials consistently identified large-scale cutbacks in inmate labor as a likely and, in their view, dangerous consequence of having to pay minimum wages. They believed that less inmate work would mean more idle time and increased potential for violence and misconduct. They also noted other potentially adverse consequences for prison operations, such as routine maintenance being performed less frequently.

On the other hand, some of the organizations we visited had a different perspective on inmate pay, based on their view that prison work experiences should be more like those in the general public. Some organizations also believed that by not paying inmates minimum or prevailing wages, prison industries gain an unfair competitive advantage and/or displace workers who are not imprisoned.

BACKGROUND

Inmate work is a major part of the corrections system's effort to operate prisons safely and constructively and to reduce prison costs. Prison work (1) reduces inmate idleness and thus the potential for prison security problems; (2) provides opportunities for inmates to improve or develop job skills, work habits, and experiences that can assist in postrelease employment; and (3) helps to ensure that maintenance necessary for day-to-day operation of the prison is performed. Inmate labor also reduces prison costs. For example, inmates perform functions such as cooking that would otherwise have to be performed by higher-paid civilian staff.

Generally, sentenced inmates are expected to perform some type of institution maintenance or industrial work on a full-time (6 to 8 hours a day, 5 days a week) or part-time basis.[3] Maintenance work includes cooking inmate meals, laundering

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[1] Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201–19).

[2] The three-judge panel held, in Hale v. Arizona, 967 F.2d 1356 (1992), that the inmates, who worked for a component of Arizona prison industries, were "employees" of the State and thus were subject to FLSA requirements. However, this case was reheard en banc by the Ninth Circuit in November 1992. Subsequent to the completion of our work, the full court reversed the three-judge panel and affirmed the decision of the lower court that the State prisoners were not entitled to the minimum wage under FLSA. Hale v. Arizona, 993 F.2d 1387 (1993).

[3] Some inmates work in the community under a work-release program, where they typically are employed during the day and return to the institution at night. These inmates are employees of private or public sector organizations outside of the prison system and thus their entitle-

Continued

inmate clothing, repairing boilers, performing clerical work, and maintaining the grounds and buildings as well as many other functions necessary for the day-to-day operation of the prison. It also sometimes includes public works projects such as assisting local communities in repairing roads and assisting forestry departments in clearing land and planting trees. Inmates may also do industrial work for the prison or private companies. This work may include manufacturing products (e.g., office furniture, mattresses, and automobile tags) and providing services (e.g., data entry and automobile repair) for sale to government agencies and sometimes to the private sector.

Most inmates who work are assigned to maintenance rather than prison industries jobs. A nationwide American Correctional Association survey in 1991 reported that about 8 percent of the Federal and State prisoners had industry type jobs.

Whether inmates are paid or the amount paid varies among the individual Federal or State systems. For example, BOP and the States generally provide some compensation to prisoners for their maintenance and industry work. However, some states (e.g., Texas) do not pay for any inmate work, while some states (e.g., Florida) generally pay only those inmates doing industry jobs. Inmate pay may be based on a rate per hour; cover a specific time period (e.g., monthly); or be based on piece work. Under some systems, inmates may also earn extra pay for overtime work and length of time employed (longevity), receive paid vacations and holidays (remain in prison but do not work), and receive payments under a workers compensation program. Some prison systems may also pay inmates for their participation in vocational training programs and in literacy or other educational programs.

Under Federal law, 18 U.S.C. 1761(c), 50 nonfederal prison work pilot projects may produce products for sale in interstate commerce, provided that, among other things, inmates employed in these projects are paid the prevailing wage for their work. These projects, referred to as the Prison Industry Enhancement (PIE) Program, are approved by the Bureau of Justice Assistance.

The Bureau requires that PIE industries pay at least the minimum wage if a prevailing wage cannot be determined. As of December 1992, PIE industries employed about 1,000 inmates nationwide.

Under FLSA, employers are generally required to pay employees at least the minimum hourly wage set by federal law for up to a 40-hour workweek. The overtime rate for all hours worked over the 40 hours is set at one and one-half times the employee's regular rate of pay. While the vast majority of employers, including State governments, are subject to the requirements of FLSA, there are a number of workers who are not covered by the law's minimum wage and overtime provisions. Prison inmates are not specifically excluded from the definition of "employee" under FLSA. However, the courts have generally held that prisoners performing work behind prison walls for prison-operated industry or for a prison itself are not entitled to minimum wage under FLSA because they are not in an employer-employee relationship with the prison.[4]

SUBSTANTIAL DIFFERENCES EXISTED BETWEEN PAY AND MINIMUM WAGE

For the most part, inmates in the five prison systems we visited either were not paid or were paid at rates that were substantially less than the federal minimum wage of $4.25 an hour. (See Appendix). For example, 60P generally pays its maintenance inmates 12 to 40 cents per hour and its industry inmates 23 cents to $1.15 per hour. Of these five systems only some Arizona and Nevada inmates had the opportunity to earn the minimum wage or more. For example, about 60 of the approximately 650 Arizona inmates working in prison industries were involved with private sector operations and could earn minimum wage.

Many inmates at the five systems were paid at the lower rates of the established pay scales. For example, 80P policy for nonindustry inmates provides that about 55

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ment to minimum wage would depend on whether their work for these organizations meets the criteria for FLSA coverage. Consequently, these inmates were excluded from our review.

[4] See Hale v. Arizona, 993 F.2d 1387, 1393–95 (9th Cir. 1993) (inmates working in prison programs structured under Arizona law requiring prisoners to work at hard labor were not "employees" of the prison under FLSA); Harker v. State Use Indus. Envelope Shop Inmates, 990 F.2d 131, 135–36 (4th Cir. 1993) (FLSA does not apply to prison inmates performing work at prison workship within the penal facility as part of rehabilitative program); Vanskike v. Peters, 974 F.2d 806, 807–9 (2d Cir. 1992) (inmate who worked in Illinois prisons as a maintenance worker and knit ship line worker was not entitled to minimum wage under FLSA). It should be noted that some courts have found inmates to be entitled to minimum wage under FLSA when the inmates are performing work for private, outside employers. See, e.g. Carter v. Duchess Community College, 735 F.2d 8 (2d Cir. 1984) (holding that FLSA might apply to an inmate working as a community college tutor for classes taught inside a prison).

percent of the inmates are to be paid an hourly rate for maintenance work at pay grade 4 (12 cents), 25 percent at grade 3 (17 cents), 15 percent at grade 2 (29 cents), and 5 percent at grade 1 (40 cents). Our review of prisoner payroll records at the four federal prisons we visited indicated that the inmates were generally being paid at the lower pay grades.

Our analysis of data from the Justice Department and others 1indicated that the nation's other prison systems had similar pay rates for their inmate workers. For example, a nationwide survey done by the Justice Department indicated that prison industry inmates were generally paid a regular rate of less than $1 an hour during 1991.

COST OF PAVING FOR EXISTING WORK LEVELS AT MINIMUM WAGE

All five prison systems would face a substantial increase in costs in the hundreds of millions if existing inmate work levels had to be compensated at the minimum wage. If required to pay the minimum wage, officials at these systems noted that they would likely impose substantial user fees and reduce their inmate labor levels.

BOP officials told us that their industries paid 15,300 prisoners average rates of 87 cents an hour for 27.2 million regular hours worked and $1.75 an hour for 1.8 million overtime hours worked during fiscal year 1992. This amounted to about $26.9 million for inmate compensation—$100 million less than what paying the minimum wage would have cost for the same number of hours. Although overall data were not available, our review of payrolls at the four federal prisons we visited indicated that the difference in pay for maintenance work would have been substantially greater than the difference for industrial work had the inmates been paid minimum wage. This is because wages for maintenance work were substantially less than the wages for industrial work and because most inmates work in maintenance jobs.

At the State level, for example, Arizona officials noted that their industries paid about $614,000 in inmate wages for the year ending June 30, 1992, as compared with about $3.7 million they would have paid for the same number of hours at minimum wage. Arizona officials did not have statewide information on how much inmate maintenance would have cost at minimum wage. However, at the Arizona prison we visited officials estimated that for the year ending June 30, 1993, they will pay inmate wages of about $458,000 (average of 26 cents an hour) for maintenance work compared with about $7.5 million if the estimated number of hours were paid at minimum wage.

These hypothetical differences between existing and minimum wage payrolls do not include the cost of employer-paid benefits that inmates may be entitled to if they were considered to be employees. For example, under certain circumstances prison systems and the inmates both could be subject to paying social security taxes amounting to 7.65 percent of the inmates' earnings.

On the other hand, the differences between existing and minimum wages do not include potential charges such as user fees and taxes which could result in some of the additional wage costs being returned to the federal and state governments. For example, officials at the prison systems we visited generally believed that if inmates were to receive the minimum wage, the prison systems would be forced to assess substantial user fees. Of the five prison systems we visited, only Nevada imposes a room and board charge on its maintenance and industry inmate workers who earn less than minimum wage—24.5 percent of their weekly wages in excess of $18. Nevada also charges nonindigent inmates $4 each time they report on sick call.

Victim restitution and child support payments are examples of other possible deductions from inmates' pay. Unlike room and board charges, however, these deductions represent funds that would be paid to members of the general public and not recovered by federal and state treasuries. However, some payments may result in reduced government expenditures. For example, if the inmates paid child support and their children are supported by government aid programs, the net effect may be to reduce the amount paid by Federal and State Governments.

CONTACTED PRISON SYSTEMS' VIEWS ON PAYING MINIMUM WAGES

Because there is little available research or studies on the potential impact of prisoners being covered under FLSA's minimum wage provisions, some ramifications are unknown. Nevertheless, the 20 prison systems we contacted generally believed that paying minimum wage would adversely affect prison work, job training programs, and prison security. They also noted other potential issues associated with treating inmates as employees and identified few benefits of paying inmates minimum wages.

Officials did not believe that they would be able to continue to employ the same number of inmates if they had to pay the minimum wage. For example, Arizona officials said it was unlikely that they would be given the additional funds to pay minimum wages, even if the increased pay amount was substantially reduced by imposing user fees. Therefore, Arizona officials maintained that they would be forced to substantially reduce the inmate workforce.

The four other prison systems we visited told us that they would also have to substantially reduce the number of inmates who work if minimum wages had to be paid. Officials from the 15 prison systems we surveyed by telephone also said that fewer inmates would be permitted to work. Further, 13 of the 20 prison systems contacted believed that the inmates who remained employed would work fewer hours, while 3 thought they would work more, and 3 thought they would work the same number of hours. One system did not know how the number of hours inmates worked would be affected.

OTHER POTENTIAL IMPACTS OF PAYING MINIMUM WAGE

The prison systems provided similar responses to questions about potential impact on (1) inmate idle time, (2) prison security, (3) efforts to teach good work habits and job skills, (4) industries' earnings, (5) routine institution maintenance, and (6) public works.

All 20 prison systems told us there would be increased inmate idle time and more inmate rule infractions or security problems if minimum wages had to be paid. Officials at both the prison system headquarters offices and at the specific prisons we visited consistently noted that reduced inmate work would mean more inmate idle time, contribute to more inmate disorder and violence and make their prisons more dangerous. For example, according to 60P, the reduced employment "would seriously jeopardize the security of federal penal and correctional facilities, as idleness and boredom multiplied among an inmate population serving significantly longer sentences, with virtually no prospects for early release."

All 20 prison systems thought that efforts to teach good work habits and/or job skills would also be reduced. BOP's prison industry officials said that the reduced employment would deprive thousands of inmates of the opportunity to learn the basic work skills that are essential to success in the outside world.

Nineteen of the 20 prison systems we contacted had prison industries. Of the 19, 17 responded that having to pay minimum wage would eliminate or substantially reduce earnings from those industries. For example, B0P said that paying minimum wage would result in a substantial increase in product cost, to the point that their products would not be competitive. Consequently, B0P told us that it would have to automate much of its industrial production and reduce inmate employment drastically in order to control labor costs, continue to offer products to federal agencies at current market prices, and remain self-sufficient.

Regarding the impact on institution maintenance, 19 prison systems thought minimum wage would lead to less frequent routine maintenance. The other thought that maintenance efforts would be enhanced because only the most motivated and able inmates would be filling the fewer jobs available.

In response to our final survey question, 17 prison systems told us they had inmates who performed public service projects. Of the 17, 12 thought that minimum wage would result in such projects being abolished and 5 said that fewer projects would be done. For example, a Nevada official told us that they would have to stop much, if not all, of the roadwork and other public service now done by approximately 1,500 work camp inmates.

OTHERS' PERSPECTIVES ON PAYING MINIMUM WAGE FOR PRISONER WORK

Some organizations and studies had a different perspective on inmate pay than the prison officials we contacted. Some generally favor improving inmate work programs and inmate pay through greater use of prison industry programs. These programs could be operated by, or operate like, private sector businesses, the "factories with fences" approach. Some also support paying inmates the prevailing wage so that prison industries do not have an unfair competitive advantage over businesses that do not have access to prison labor.[5]

The "factories with fences" approach had its roots in Justice Department efforts in the mid-1970s to assist states in coping with the problems of inmate idle time and inefficient work programs. The Justice Department provided funds and other

[5] In our discussions of this matter with 60P officials, they pointed out that federal prison industries are a mandatory source of procurement for other federal agencies.

support to implement a prison industry model in participating states. The model was based on private sector concepts such as productivity-based wages. In 1979, Congress authorized seven PIE projects that allowed the seven participating correctional agencies to sell the products of private sector-operated prison industries across state lines, provided, among other things, that inmates be paid the higher of the prevailing wage in the free market or the minimum wage and be assessed charges such as room and board. (The Justice Department was given responsibility for certifying that a project or correctional agency met the PIE criteria.) Through subsequent amendments, Congress raised the number of authorized PIE projects to 50.

In the 1980s, then-Chief Justice Warren Burger, working with representatives from the corrections, business, labor, legal, and academic communities, further promoted the idea of greater private sector involvement in prison industries. It included having those industries pay prevailing wages, sell products to the public, and generally operate like free-world industries. Under the program, deductions were to be taken from the inmates' pay for such items as room and board, taxes, and victim restitution.

Our review showed that the "factories with fences" concept was expected to apply to industries work. Also, according to representatives from The Brookings Institution and the now-defunct National Center for Innovation in Corrections involved in developing the concept, it was anticipated that because of budgetary and other problems, many prison systems would not extensively pursue the concept. A 1989 Justice Department survey found that only about 5,000 inmates had worked in PIE and non-PIE private sector-operated industries.

Concerning the issue of unfair competition, prison industries, like BOP's, have long faced criticism from labor groups and businesses about the low wages paid to inmate workers. The American Federation of Labor and Congress of Industrial Organizations' (AFL-CIO) position is that prison labor programs should pay wages that are not less than the prevailing wage for similar work in the private sector to avoid unfair competition and displacing workers who are not imprisoned. The AFL-CIO also says that inmates should pay room and board, taxes, victim restitution, and where necessary, dependent support. However, the AFL-CIO opposes the sale of prison-made goods and services to the public.

This concludes my prepared statement. I would be pleased to answer any questions the Committee may have.

Basic Inmate Pay Policy At Visited Prison Systems

Prison system	Maintenance pay rates	Industries pay rates
BOP	Generally 12 to 40 cents an hour; outstanding work could result in a bonus of up to one-half an inmate's monthly pay. Some inmates are paid only $5.25 a month because of, for example, budget problems.	23 cents to $1.15 an hour with up to 40 additional cents an hour on the basis of work considered outstanding and length of time employed.
Arizona	10 to 50 cents an hour.	40 to 80 cents an hour, but inmates involved with private sector industries earn minimum wage ($4.25).
Florida	Only pays a few inmates (e.g., inmates working in canteen operations receive $50 to $75 monthly).	15 to 45 cents an hour with increases, based on length of time employed, of up to 15 cents an hour.
Nevada	Prison officials decide who is to be paid and how much; pay is generally less than $1 an hour.	Minimum wage ($4.25) for private sector-operated industries. For prison managed industries, pay is based on piece rates that could exceed minimum wage.
Virginia	20 to 45 cents an hour.	55 to 80 cents an hour.[a]

[a]These rates were being implemented at the time of our visit.

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Senator WELLSTONE. Thank you very much.

I will start with Ms. Echaveste, if I could. What is the Department's understanding of the congruence between the coverage of the FLSA and the Ashurst-Sumners Act as it relates to the payment of minimum or prevailing wages to prison inmates? Do both statutes cover services?

Ms. ECHAVESTE. No. In fact, the Ashurst Act, or the PIE program, is limited to goods produced for interstate commerce, and that is why we see these two statutes as complementary. The FLSA also covers services.

Additionally, the enforcement mechanisms in both statutes are different. Under the PIE program, it is essentially criminal prosecution against the employer, whereas under the FLSA it is the ability to recover back wages and have a private cause of action.

Senator WELLSTONE. A May 1993 report for the Bureau of Justice Assistance on PIE projects indicates that the program participants have some confusion over compliance issues involving 1) the distinction between products and services, 2) how to set wages and benefits, and 3) what constitutes interstate commerce. It recommends training in these areas with the assistance of the Department of Labor.

Could you comment on what steps, if any, have already been taken in this area?

Ms. ECHAVESTE. Well, we have only just received the Bureau of Justice Assistance report in the last week or so, so we are not fully familiar with it. However, we are fully prepared to assist the PIE program and the Justice Department to provide technical assistance, to provide training and provide our expertise in these issues, since that is what we do. We have individuals who are quite knowledgeable about coverage issues, about the setting of wages, and we think that providing training in this respect could really improve the program.

Senator WELLSTONE. Is there anything in the FLSA that requires the payment of fringe benefits, and how would you respond to States' concerns that they could be liable for such benefits?

Ms. ECHAVESTE. There is nothing under the FLSA that requires the payment of vacation or sick leave. It simply concerns itself with minimum wage and overtime.

The question of workers' compensation, those are State programs, and I believe to participate in the PIE program, you must comply with workers' compensation laws.

Senator WELLSTONE. I thank you.

Ms. Gibson, in estimating that the five prison systems you reviewed would have to spend hundreds of millions of dollars more if they paid inmate workers the minimum wage, did you include the cost of paying maintenance workers at that level?

Ms. GIBSON. Yes, we did include maintenance workers in our study.

Senator WELLSTONE. Do you agree that under the current State of the law, inmates performing maintenance work are not subject to FLSA, and if so, why did you include such inmates within your review?

Ms. GIBSON. To answer the first part of your question, we are not aware of any court decision holding that inmates working in main-

tenance jobs for a prison are subject to the FLSA and entitled to the minimum wage. One court that specifically addressed the issue, the Seventh Circuit, in the case of Vanskike v. Peters, specifically addressed the claim of a maintenance inmate who was doing janitorial services and kitchen work and held that that inmate was not an employee within the scope of FLSA.

To answer the second part of your question, we looked at maintenance workers because in doing our review, we designed it according to the request we received from Senator Reid. Senator Reid asked that we look at the effect on the Nation's prison systems if they were required to pay all inmate workers the minimum wage. And as I noted in my statement, his request was prompted by the Ninth Circuit panel decision in Hale v. Arizona, which held that workers in State-operated prison industry were employees within the scope of FLSA and were entitled to the minimum wage.

Senator WELLSTONE. Were you asked to provide an analysis of S. 1115's impact to Senator Reid?

Ms. GIBSON. No, we were not asked to do that.

Senator WELLSTONE. I thank you very much. I appreciate your testimony.

We will probably move along at a little brisker pace just because of the delay because of the votes.

Thank you very much for your testimony.

Senator WELLSTONE. We will now move to the third panel. Our third panel consists of different perspectives from the State and private sectors.

Mr. Angelone is director of the department of prisons in the State of Nevada and has worked closely with Senator Reid to bring problems in this area to the committee's attention. We certainly hope to work with you, Mr. Angelone.

Mr. Zalusky is an economist and the head of the Office of Wages and Industrial Relations with the AFL-CIO, and he is an old friend—I will not emphasize "old"—a good friend of the committee.

Ms. Perry is representing the Prison Industries Reform Alliance, an organization formed to protect industry and labor from Federal and State prison industries, and with her is Mr. Lange, the vice president and general manager of Brill Manufacturing Company, a small manufacturer of furniture located in Luddington, MI which has been adversely affected as I understand it by prison industries.

We have also received testimony from Jack Sizemore of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America of United Auto Workers.

[The prepared statement of Mr. Sizemore follows:]

PREPARED STATEMENT OF JACK SIZEMORE

Mr. Chairman, my name is Jack Sizemore. I am the director of region 2B of the international union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). I am here today representing more than one million active and retired UAW members. We appreciate the opportunity to testify on S. 1115, the legislation introduced by Senator Reid to amend the Fair Labor Standards Act (FLSA).

The UAW strongly 0pposes S. 1115. This legislation would narrow the current FLSA definition of "employee" by expressly exempting State or Federal prisoners. This would effectively exclude these persons from the minimum wage and maximum hour protections that are guaranteed under the FLSA. In practical terms, S. 1115 would permit penal and correctional institutions to contract with private firms for

the use of prison labor, thereby encouraging non-compliance with minimum wage, maximum hour, and other worker protections in the Federal statute. Employers that take advantage of this cheap prison labor would have an unfair competitive advantage, which in turn would undermine prevailing wages and working conditions at other employers.

While the UAW recognizes the need for programs to rehabilitate prisoners, we strongly oppose using prison inmates as a source of cheap labor. If S. 1115 were enacted, we could foresee an increasing number of private businesses deciding, based on economic advantage, to hire available prison workers in order to reduce labor costs and enhance company profits. The consequences would be disastrous for manufacturing and services workers in private industry who could find themselves displaced by cheap prison labor.

Let me give you specific examples from my own State of Ohio so that you can understand some of the consequences of the exemption proposed in S. 1115. In 1991, Wastec, Inc., a Hillsboro, OH. company making automotive parts for Honda Accords, contracted with the Ohio Rehabilitation Department to use inmates from Ross Correctional institution to produce hoses, auto wiper switches and lighting switches for assembly at the Honda plant in Marysville, OH. Weastec paid the State of Ohio the equivalent of $2.05 per hour per inmate, with the inmates receiving only 35 cents per hour for their work. The "prevailing wage" requirement for government contracting was ignored, and the inmates were paid wages as low as those given to workers in many Third World countries.

Another example is Unibase Data, Entry, Inc., a Utah-based company, which has a 5-year contract to use Ohio inmates to do data entry. Unibase paid the State of Ohio $1.86 per hour with the inmates receiving 35–42 cents per hour.

Similarly, last year Thomas W. Ruff & Company of Columbus, OH negotiated a contract with the Ohio Penal Industries (OPI) to use inmates to refurbish, repair, and redesign modular office systems. OPI estimated that approximately 50 new inmate training positions would be created.

To make matters worse, a task force appointed by Ohio Governor Voinovich recently recommended that OPI be established as a free foreign trade zone and be managed as a private business. Mr. Chairman, let's look at the implications of those recommendations. How can a small employer in Ohio compete with OPI operating as a private business? It is my understanding that OPI pays no unemployment compensation or worker compensation taxes. Nor are they required to comply with minimum wage requirements or private sector OSHA standards or a host of other regulations required of small businesses.

The UAW believes that there are good reasons to let prisoners work as part of a skills-training program that would have rehabilitative effect. At the same time, we should not allow that king of program to be implemented at the expense of private sector workers and businesses. The UAW believes that prison labor programs should:

—provide training for work likely to be available to prisoners after their release,

—produce goods and services that are exclusively for government use,

—pay wages that are no less than the prevailing wage for similar work in the private sector, and pay appropriate taxes,

—prohibit the use of prison labor to replace strikers or provide services that may prolong a strike, and

—prohibit the displacement of existing jobs by prison labor.

The unemployment rate in Ohio, as in many parts of the country, remains unacceptably high. Those workers who have lost their jobs should not find themselves in an impossible situation where they have to compete with low-wage prison labor for a job.

Mr. Chairman, the UAW urges you to reject the faulty approach proposed in S. 1115 that would threaten the jobs and livelihood of workers in the private sector. We thank you for this opportunity to testify before this committee and would be happy to respond to any questions.

Senator WELLSTONE. I thank each one of you for being here, and we will start with Mr. Angelone. Thank you for being here, and again, we do look forward to working with you.

STATEMENTS OF RON ANGELONE, DIRECTOR, DEPARTMENT OF PRISONS, STATE OF NEVADA; JOHN ZALUSKY, HEAD, OFFICE OF WAGES AND INDUSTRIAL RELATIONS, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; AND SUE PERRY, PRISON INDUSTRIES REFORM ALLIANCE, ACCOMPANIED BY DENNIS LANGE, VICE PRESIDENT AND GENERAL MANAGER, BRILL MANUFACTURING COMPANY

Mr. ANGELONE. Thank you, Mr. Chairman.

My name is Ron Angelone. I am the director of the Nevada Department of Prisons. I am here today to discuss the serious implications on not only our prison industry programs, but on the entire system, should S. 1115 not pass.

In the United States, State and local government spend well in excess of $1 billion a year, the equivalent to the annual budget for the running of the entire State of Nevada, to defend against frivolous lawsuits filed by prisoners.

I know that the FLSA was not intended to provide prisoners with another avenue to sue States in our Federal court system, but by not exempting prisoners, millions of taxpayers' dollars are now being spent across the country in defense of, developing impact analysis for, or dealing with the onslaught of copycat suits.

The problem we face is that the interpreters of the law, that being the judicial branch, has not helped in the process. Justice Trott said that the FLSA was not intended to apply to inmates. Yet Justice Nelson, a member in the same district, said that the FLSA was intended to apply to prisoners.

If the eyes of justice are looking in both directions, then I think it is apparent that Congress must step in and make it clear to all, so that millions of dollars a year will not be needed to be spent fighting this issue every time an inmate files a frivolous lawsuit, requesting relief by the wording of the law, maybe not for the intent of the law.

Congress has modified section 213 on numerous occasions but has never added prisoners to the exempt list. The FLSA was enacted to protect both employer and employee by ensuring that cheap labor does not take advantage of their workers or of their competition. Congress enacted protection through the Prison Industry Enhancement Act, ensuring that any interstate production or sales of products must meet prevailing wage to ensure that prison-made products compete fairly on the open market.

Nationally, approximately 1.2 million people are incarcerated in prisons. Out of this number, 62,000 inmates work in correctional industry programs. Of these, 1,200 are employed in programs certified under the Prison Industry Enhancement Act and potentially involved in interstate commerce. How this can be a threat to the future of industry in the United States is not clear to me.

It is most important that whatever decision is finally made, either all inmates working within our institutional walls are exempt, or none are. Providing categories of exempt inmates will only open the door wider for numerous lawsuits, testing the limits of groups that are not exempt. We would be better off relying only on existing case law, which at the court of appeals level is and has been uniform, than to change the wording or intent of S. 1115.

I want to thank you for your indulgence, and I would be glad to answer any questions after the panel is through.

Senator WELLSTONE. Thank you, Mr. Angelone.

[The prepared statement of Mr. Angelone follows:]

PREPARED STATEMENT OF MR. ANGELONE

Mr. Chairman, members of the committee, my name is Ron Angelone, director of the Nevada Department of Prisons. I am here today to discuss the serious implications on not only our prison industries programs, but our entire system should S. 1115 not pass. In the United States, State and local government spend well in excess of $1 billion every year, equivalent to the annual cost of running the entire State of Nevada, to defend against frivolous law suits filed by prisoners. The Hale v. Arizona case, which's initial 9th Circuit decision triggered this legislation began litigation in 1985 and has still not been finally resolved in late 1993. This case alone has resulted in millions of dollars of tax payers money having been spent across the country in defense, impact analysis and copy cat suits.

Nevada has a range of correctional industries programs from traditional to extremely creative in both our prisons and our jails. In addition to the general institutional programs that can be found in all States such as maintenance, culinary, education, etc., our State prison industries programs include the following:

NEVADA STATE PRISON

License plates, printing, book binding, linen, detergent and mattresses (both traditional and PIE).

NORTHERN NEVADA CORRECTIONAL CENTER

Metal (both traditional and PIE), furniture, upholstery, ranching and water bed manufacturing (PIE and private sector.).

NEVADA WOMEN'S CORRECTIONAL CENTER

Circuit board manufacturing by Bently Nevada (PIE and private sector).

ELY STATE PRISON

Drapery manufacturing (PIE)

SOUTHERN DESERT CORRECTIONAL CENTER

Auto repair and restoration, limousine manufacturing, furniture, wood products, stained glass and upholstery (all PIE) and classic and antique auto restoration (PIE and private sector).

Without S. 1115, the costs of litigating coverage by the FLSA will continue. Nevada has had three such suits filed in the past year, one against the Department of Prisons, one against the White Pine County School District and one against the Clark County School District. Each will have to be defended at significant cost to the taxpayers of Nevada, probably over a number of years such as in Hale. And they continue to be filed in spite of recent court decisions including the reversal of Hale. The most recent filing in Nevada was on September 15, 1993 (CV–S–93–467 LDG (LRL)). Additionally in the Ninth Circuit, the same circuit in which Hale was reversed en banc only 5 months ago. two California cases, Jurnigan v. Gomez (Civ. S–92–1408 GEB PAN) and Burleson v. Gomez (Civ. S–93–200–GEB PAN) are pending in the U.S. District Court, Eastern District of California. Judge Burrell designated on August 2, 1993 that the decision in Hale was not relevant in these cases because work is voluntary in California, and therefore they are both now "an action under the Fair Labor Standards Act rather than a prisoner civil rights case." This clearly creates an uncertainty about Hale in our district a very short time after the decision that inmates are not covered by the FLSA. Nevada, as is true in many other States, in practice has a voluntary work program, which is also defined in our administrative directives allowing for participation in the PIE program, and therefore the pending California cases may be even more relevant than the Hale case. Of additional note is that the original Hale decision followed by only months the Gilbreath v. Cutter decision in the 9th Circuit (931 F.2D 1329) that ruled that when inmates were employed by the private sector they were not covered by the FLSA. This clearly shows within one district the difficulty the courts are having with this matter.

It is also of importance to note that in the original Hale decision, before the en banc reversal, the court specifically included license plates, prison beds and other in-house industries, as well as industries owned and operated by inmates themselves. With the California cases pending, as well as the Nevada cases just beginning, it appears that this will continue to be a costly area of litigation for State and local government until the Congress makes it clear that there was no intention to cover inmates under the FLSA. In Larry George v. Badger State Industries (92–C787–C July 20, 1993) the district court ruled that inmates were not covered by the FLSA in such traditional industries as a laundry and license plate factory. However it is significant that the court accepted the case, noted that prisoners are not categorically excluded from the protection of the FLSA, and ruled following arguments at great taxpayer's expense in the State of Wisconsin. Van Skike v. Peters, settled in 1993 in Illinois effectively used training and rehabilitation as a defense, again at great taxpayer's expense in the State.

The position that inmate coverage is not an issue appears to be a conclusion of Harker v. State Use Industries (Maryland) in the Fourth Circuit, case 92–1296 decided March 24, 1993 in which the court stated "for more than 50 years, Congress has operated under the assumption that the FLSA does not apply to inmate labor. If the FLSA's coverage is to extend within the prison walls, Congress must say so, not the courts." Yet as the above indicates, the courts are still considering the extension into the prison and unless Congress says otherwise, this battle will have to be fought over and over at great expense to the limited financial and manpower resources available at State and local government levels. And there is no guarantee that the courts will not at some point determine that any work that can be performed by the private sector, including most work performed by inmates at all levels, such as institutional maintenance, should be protected by the FLSA unless Congress clearly states otherwise.

Other considerations also enter into this decision. I will attempt to very briefly describe some of them below.

Meaningful work programs reduce inmate idleness and therefore reduce violence, security costs, etc. Such programs would more than likely be reduced or eliminated if FLSA coverage is required for inmates in correctional industries as the GAO report indicates. Staff safety is put at much higher risk with idleness.

States which require inmates to work will have to assume substantially increased costs without alternatives, if inmates are not excluded from the FLSA. The consequences, not only on bugets, but on taxpayers' assessment of government efficiency will be devastating.

It must be pointed out that the FLSA was designed to provide a minimum standard of living for workers. The national cost of incarceration is well over $20,000 per inmate, in excess of the minimum wage and already provided for inmates by the taxpayer. This cost includes food and housing as well as medical care, legal assistance, etc., most considered to be part of wages in prior case law.

Covering inmates by FLSA makes them employees—are they entitled to vacation pay, retirement and medical coverage for their families like other State employees? How do we justify such taxpayer's expenses to those citizens who can't even provide basic needs to their own children. I appeared on Current Affair last week where I stated that we should spend our resources on the rehabilitation of victims not offenders. In the numerous calls we received in response to the show, not one said that inmates should receive more, all agreed with my position.

Most correctional industries programs provide products for the State or local government at cost savings. Programs were developed in response to unemployment and restrictions on inmate manufactured goods in the 1930's. FLSA protection will kill these programs. How can we justify increased costs to the taxpayers in times when they even voted down a bond issue in Clark County, Nevada to provide more law enforcement?

Inmates look at the wording, not intent, of legislation. As indicated before, any exceptions to the exclusion of inmates within the confines of our institutions will result in more law suits being filed based on working not intent. We must exempt all inmates, except perhaps those in work release in the free community, and provide necessary protection, through other laws such as PIE—as authorized by Congress in 18 USC 1761. If abuses are the concern of this committee, increase punishments under PIE, don't destroy our prison systems.

Many of you are aware of the problems we have had in initiating our drapery program at the Ely State prison in Nevada. Three Ely inmates developed a law suit and sent it to customers to chill our program after they were terminated for cause. The current ambiguity seen by inmates and some courts in the Fair Labor Standards Act encourages such frivolous law suits. A recent on site visit, although identi-

fying some problems, as is always true in audits, clearly showed no unfair competition nor intent to violate the PIE program requirements.

Nationally, approximately 62,000 inmates work in correctional industries. This is out of a total incarcerated population of 1,200,000. Of these4 less than 1,200 are employed in programs certified under the PIE program and potentially involved in interstate commerce. How this can be a threat to the future of United States industries is not clear to me. Particularly since many of these jobs either where bound for or were already in other countries. PIE generally provides entry level jobs. We really aren't effective at rocket science in prison.

The vast majority of correctional industries programs have developed product lines to reduce costs for local and State government. These programs were developed in response to the original legislation prohibiting inmates from engaging in work in interstate commerce in the 1930's. Placing this group under the FLSA will clearly create increased idleness in our institutions and further increase the costs of operating State and local government at taxpayers' expense.

In Nevada some certified programs have not engaged in interstate commerce (MATTRESS) but are still certified in anticipation of doing so later. We do not feel that this bill should be defeated because of some States ignoring the requirements of PIE. Rather we feel that those sanctions already in place should be pursued.

PIE protection not only required minimum wage, but also comparable wage, be paid to inmates competing on the open market. Currently the protection to the private sector provided by the Prison Industries Enhancement Act exceeds the protection that would be provided by the FLSA. Protection against exploitation of inmates is also greater under PIE than FLSA. For private sector companies operating in prison, coverage by the FLSA may well preclude PIE legislation and allow for lower than comparable wages.

Workman's compensation is not provided to inmates except under PIE. Inmate injuries will increase if coverage is mandated for all inmates. Any inmates considered employees under the FLSA will probably be ultimately protected by not only workman's compensation but also by unemployment compensation. I seriously doubt that the average taxpayer will be pleased by this.

Small businesses generally benefit rather than suffer in Nevada. We work with small businesses. We purchase whenever possible from local small business. We provide a stable entry level work force for them when none other is available. We help entrepreneurs introduce their products when other manufacturers require costs beyond their means. Correctional industries does not have to be a negative in the business community. In the past 6 years, while actively competing on the open market in a wide range of products, we have only received four complaints about competition. One of those was from out of State and two others were offered partnerships in joint ventures and chose not to do so.

It is most important that whatever decision is finally made, either all inmates working within our institutional walls are exempted or none are. Providing categories of exempted inmates will only open the door for numerous law suits testing the limits of groups that are not exempted. We would be better off relying only on existing case law which is uniform, than on any type of ambiguity that might result from changes in S. 1115.

I want to thank you for your indulgence and will gladly answer any questions you might have.

Senator WELLSTONE. Mr. Zalusky.

Mr. ZALUSKY. Thank you, Senator.

My name is John Zalusky, and I am in the AFL-CIO economic research department, and I want to thank you for having us here.

The AFL-CIO opposes S. 1115 because it is wrong for State-owned prisons to create or support businesses paying convicts substandard wages to take jobs from free labor who have committed no crime.

The AFL-CIO shares Senator Reid's view that convicts should be working and should not be idle, and that the work they do should impart values that are useful to the free world. However, we believe that working at exploitive wages sends exactly the wrong message and bestows the wrong values. It says that hard work is unrewarding and that Government is an oppressor.

The AFL-CIO does want convicts working. Idle inmates add risk to the work of correctional officers. In my testimony that I submit-

ted earlier, we did enclose a copy of an earlier letter we sent to Congressman Foley concerning a report by the U.S. Department of Labor on the PIE programs under the previous administration. I would like to suggest that I find the current administration much more helpful than the previous one on this issue. However, we have serious reservations about the Bureau of Justice enforcing existing laws under the Ashurst-Sumners Act with regard to prevailing wages. We find the Fair Labor Standards Act is a floor, and the other laws go above that.

I think the Department of Labor, even as well-intentioned as it is today to seek enforcement here, used to have 1,300 compliance officers and now is down to 817. I think their ability to enforce here is diminished simply by staff.

So we do need the Fair Labor Standards Act as well as the Ashurst-Sumners Act to ensure that there is a more even playing field with regard to private sector business and free labor.

The AFL-CIO supports the self-use concept of prison labor with effective business and labor input in the decisionmaking process to ensure minimal adverse impact on free labor and business.

I would be glad to answer any questions you have.

Thank you.

Senator WELLSTONE. I will have several questions for you.

Thank you.

[The prepared statement of Mr. Zalusky follows:]

PREPARED STATEMENT OF JOHN L. ZALUSKY

The AFL–CIO opposes S. 1115, because it is wrong for State-owned prisons to create or support businesses paying convicts substandard wages to take jobs from free workers who have committed no crime.

The AFL–CIO shares Senator Reid's view that convicts should be working and should not be idle, and that the work they do should impart values that are useful in the free world. However, we believe that working at exploitive wages sends exactly the wrong message and bestows the wrong values. It says that hard work is unrewarding and that government is an oppressor.

The AFL–CIO does want convicts working. Idle inmates add risk to the work of correctional officers.

The AFL–CIO supports the self-use concept of prison labor with effective business and labor input in the decision making process to insure minimal adverse impact on free labor and business.

Mr. Chairman, the AFL–CIO appreciates this opportunity to testify on the wages and benefits to be paid convicts when prison creates businesses that produce goods and services for commerce. S. 1115 would free prison businesses of any obligation to pay convicts as required by the Fair Labor Standards Act.

The issue is whether convicts should take jobs from free workers who committed no crime and whether prison business should get special categories in competing against free business. State prisons complain that prison business cannot compete in the open market if they must pay the Federal minimum wage. Implicit in this argument is that prison business should be given advantages over private sector businesses we deserve. We disagree. We are against laws that generate unfair competition to private businesses paying decent wages.

Make no mistake, the AFL–CIO supports prison programs that put convicts to work. Prisons guards, who are represented by our affiliates, want convicts working. Work fills the time of convicts and reduces the very real risks to correctional offices. If convicts are idle, the risks correctional officers face increase exponentially. I have visited prisons and talked with our members about this issue. They tell me that work is a particularly effective means of filling an inmate's time., But, at the same time, they do not want work taken from free labor.

There are ways of putting convicts to useful work that minimize risk to business and labor. Repealing the Fair Labor Standard Act's application to prison business is not one of them. There has been over a century of experience with unfair competi-

tion to private business from prison business. This Nation should not revisit that history.

The AF of L opposed convict labor beginning in 1881. Organized labor agreed to a set of compromises on this matter in the 1930's. The agreements were, and are, that the Federal and State Governments would use convict labor only to produce goods and services for self-use, that there would be no interstate shipment of convict made goods (Walsh-Healy Act of 1938), and that convict made goods not enter the country (Trade Act of 1930). These arrangements address convict idleness, the State's need for convicts to do normal housekeeping chores, the need to recover some of the cost of incarceration and rehabilitation, even at the cost of convicts doing work that otherwise would be done by free labor.

Convicts taking jobs from free citizens is a serious problem. There are now 1.3 million persons in prisons or jails. The United States has highest incarceration rate in the world. I have heard it said—by those who would like to see private sector business using "factories with fences,"—that 45 percent of the convicts could be working. That translates to nearly 600,000 jobs. But, the United States now has 8.7 million officially unemployed, and 16.4 million with a job-related income loss—one of every eight workers. In August there were 40,000 fewer payroll jobs then in July. Policies that artificially stimulate the employment of convicts is unwise and it is unjust.

The injustice lies in the fact that the use of convict labor nearly always hits the private sector industries paying low wages and/or having the most trouble—printing, shoes, the needle trades, furniture, and telephone solicitation and reservations. The result is that the weakest members of society are forced to give their jobs to convicts so the State can say it is saving a little money on incarceration costs. But, the appearance of saving taxpayers money is illusionary.

The tax savings are a bookkeeping fallacy. Each private sector job is worth $45,000 per year to the economy. On average it costs $20,800 per year to keep a convict. Trading free labor jobs to cover a part of the cost of incarceration is just plain bad economics. When a private sector job is lost, tax dollars are lost and additional demands are put on public assistance. The savings of prison labor on one side of the ledger are offset on the other.

States chasing the illusionary benefits of convict labor have produced a long and colorful history of unfairness, injustice and corruption. In the 1930's and 1940's, the corrupt use of the Georgia chain gangs cost Governor Eugene Talmage his reelection, and nearly sent him to jail. The Wicker Workshop Company, a Joliet Illinois State Penitentiary industry, and similar workshops in other State prisons destroyed the art form of caning and the wicker furniture business, and with it the Reed and Rattan Furniture Workers Union and the whole industry made up of small firms. Contributing to ruining the industry, Ohio, seeking a prison profit center and competitive advantage with low cost convict labor, used taxpayer money to build two of the most technologically modern wicker furniture factories [1]

In 1984, the Arizona prisons leased the Cudahy meat packing plant in Phoenix, AZ. The prison authorities then fired 400 members of the United Food and Commercial Workers, scaled down operations and gave their jobs to 60 convicts. The venture failed and the jobs of the free workers, who committed no crimes, were lost forever. All this occurred in direct violation of the Prison Industry Enhancement Act of 1979 (U.S., P.L. 96–157) which allowed the formation of 7 demonstration projects with the ability to ship their goods in interstate commerce, provided there was no adverse employment effect, paid prevailing wages and consulted with labor organizations [18 USC 1761]. The United Food and Commercial Workers protested to the Department of Justice and asked that Arizona's certification be withdrawn under the PIE program. It is hard to imagine a more blatant violation! But, certification was not withdrawn.

Last year, while AT&T was reducing its work force, the company hired a contractor who, in turn, contracted with the Colorado State prison system to use convicts to make telephone solicitations. Consequently, while telephone workers were losing their jobs, convicts were doing their work at $2.00 per day. Today, thanks to the efforts of the Communications Workers of America, convicts are no longer making telephone solicitations for AT&T, but they are taking the jobs of workers who do not have unions.

In 1987, convict reservation clerks in the California prison system were used as strike breakers, prolonging the TWA strike and adding to everyone's hardship. Today, these convicts are still competing unfairly with free labor. The reservation

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[1] Adamson, Jeremy, American Wicker: Woven Furniture From 1850 to 1930, The Renwick Gallery of the National Museum of American Art, Smithsonian Institution, Rizzoli International Publications, Inc., Washington, DC, 1993, pages 57, 62–66.

clerks in the Northwest Airline's Los Angeles facilities live and compete in the same California service and labor market with convicts doing the work for their competitor, TWA. The convicts are paid near $6.00 per hour, which is way above the minimum wage; yet, less than one-third the wage of free labor. But, the competitive comparison is not complete. Convicts are not paid most other benefits free labor receives. it must be noted that Northwest Airlines pays for overtime, vacations, retirement benefits and the full range of other private sector employee benefits. And, make no mistake, convicts are effective reservation clerks, some have even won awards from TWA on system-wide contests.

The Prison Industry Enhancement program, that in stages lifted the ban on interstate shipment of convict made goods in exchange for paying convicts locally prevailing wages, was dishonored at its outset with the Arizona meat packing case and has not improved. Other States pay less than locally prevailing wages, which is clear in reading the GAO report, but no matter how egregious the violations, not one certification has been lifted by the U.S. Department of Justice. in response to these complaints, the 1990 amendments to the Act called for the Department of Labor to review compliance. The Department of Labor's review of compliance turned out to be a sham. The Department did nothing more than rubber stamping the information given them by the Bureau of Prisons: there was no oversight investigation—the investigation was a whitewash (See attached August 13, 1991 letter to The Honorable Thomas S. Foely, Speaker of the U.,S. House of Representatives).

Best Western, Inc. uses Arizona prisoners to make hotel reservations. Right across the State line, in Nevada, Local union 995, of the International Brotherhood of Teamsters, represent members who make reservations for the Hilton and other hotels. These workers have a base hourly rate of $10.78 per hour. On a point made in the GAO report, these union members are paid for overtime work, the employer also pays their social security taxes and other benefits.

The AFL–CIO, on behalf of these workers and all free labor, is here to tell Congress that convicts paid substandard wages, competing with free labor at slave wages, is unfair competition.

Furthermore, paying convicts less than fair wages sends the wrong message to convicts.

Convicts should be paid fairly when they are required to work; to do less is slavery. Most State and the Federal law required that prisoners work. If a convict refuses to work, that act is treated as refusal of a direct order and the inmate can be disciplined.

We share Senator Reid's view that convicts should not be idle, and that the work they do should impart values that are useful in the free world. However, we believe that working at substandard wages sends exactly the wrong message and bestows the wrong values. It says that hard work is unrewarding and exploitative, and that government is an oppressor.

A better approach is to pay prevailing wages for like work in the private sector. The AFL–CIO believes that from these earnings deductions should be made for the convict's keep, payments to a victim restitution fund, and for Federal, State and local taxes. What is more, if a convict has dependents, a fair share should go to their support. But, inmates should be left with enough reward from work to buy reading and writing material, tobacco and sodas and be able to set aside some savings for gate money. In short, if the work experience is to leave a message with a prisoner, Congress should make sure it is a rehabilitative and positive message, not one of exploitation.

Some States, including Nevada and the Federal Prison System, charge convicts for their room and board [U.S., P.L. 102–395]. Conceptually, the change in Federal law is sound, but has little practical value. Federal convicts who work in Federal Prison Industries are paid $.23 to $1.00 per hour, and earn a maximum of $2,080 per year. It costs 10 times that much to keep a convict, $20,800 per year. The AFL–CIO believes the change in the Federal Rules are a step in the right direction, but only symbolic. It would make much more sense if prevailing wages for like work were paid and more realistic deductions made.

There is also the matter of rehabilitation. When convicts enter prison or jail unable to read or write, it is not the best use of their incarceration to put them to work at a sewing machine or making signs. Because the system encourages work rather than rehabilitation, that is exactly what happens. The only way to earn any money to buy a soda, tobacco or reading material is through work. U.S. Attorney General, Janet Reno, has stressed the use of education as a way of breaking the cycle of recidivism.

One problem is that most prison systems offer no rewards for training achievements while paying for work. Politically it may seem wrong to reward a convict while attending school; yet, it is another way of avoiding idleness and prison unrest,

and it reduces competition with free labor. In fact, during the Lucasville, OH riots last year one of the early demands was for more training, and nowhere was there a demand for more work, meaningful or otherwise. The evidence indicates that inmates want to learn and that training and work are equally effective means of rehabilitation and in r3educing convict recidivism[2]. Viewed from the needs of society, encouraging education and training makes sense before putting a convict to work. When convicts are applying themselves to education or training programs, they should be given a basic allowance, and allowed to earn "good time." In many prisons the only way to earn pocket money or "good time" is by working. The result is that they come in unable to read or write; they work for pocket money; leave, and return again, still unable to read or write and are just as unemployable as ever.

In summary, the AFL–CIO wants no convict labor competing with free labor and private business. One way of controlling that is to ensure that convicts are paid by the same rules as free labor for like work, when the work performed meets the FLSA coverage criteria, and enforcing these laws. The AFL–CIO has come to believe that the United States can not afford "the lock-em up and throw-the-key-away approach" to the Nation's crime problems. We find the short term solution of avoiding these costs by turning to the production of goods and services in interstate commerce, using convict labor, completely unacceptable.

The AFL–CIO wants much more attention directed toward rehabilitation to reduce recidivism.

The AFL–CIO understands the criminal justice system is broken. We are willing to help fix it. The AFL–CIO hopes Congress now understands it is not fair to ask workers to pay the price by giving convicts the jobs free workers need—these workers committed no crime.

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, 815 Sixteenth Street, NW
Washington, DC, August 13, 1991.

The Honorable THOMAS S. FOLEY,
Speaker of the House of Representatives,
Washington, DC 20515.

DEAR MR. SPEAKER: This letter is in regard to the report of the Secretary of Labor to the U.S. Congress on Compliance by the State Prison Industries Enhancement Projects with section 1761(c) to Title 18 of the U.S. Code as required by Sec. 2908 of the Crime Control Act of 1990. The report to Congress is not responsive to the clear instruction of the law and wrongly certifies compliance with the 1990 Crime Control Act.

Section 2908 of the Crime Control Act of 1990 (Public Law 101–647: 104 Stat. 4915) requires that the Secretary of Labor "describe in detail the extent and manner of compliance by State Prison Industry Enhancement Certification programs with the requirements set forth in 18 USC 1761(c) requires that convict labor "receive wages at a rate which is not less than that paid for work of a similar nature in the locality."

This report to Congress does not study compliance. Rather, the Department of Labor (DOL) simply asked Bureau of Justice Assistance (BJA) what it was doing and restated what it said. If this had been what Congress had wanted, it did not need DOL. It is this kind of regulatory oversight that produces scandals.

This report wrongly states in its conclusions that "Based upon an examination of the data provided to the Department of Labor from Bureau of Justice Assistance (BJA), Private Sector/Prison Industry Enhancement Certification Program as administered by BJA, has developed adequate mechanisms to promote satisfactory compliance with the statutory requirements of Title 18 USC 1761(c) as amended by the Crime Control Act of 1990 (Public Law 101–647)." There could not have been an "examination of the data provided" by DOL by anyone who knew anything about prevailing wages. There should have been a compliance review. The prevailing wage concept is the basis of Title 18 USC 1761(c).

Since 1984 the AFL–CIO has been making the point that the Bureau of Prisons has not enforced the prevailing wage part of the law. In recent years, we have stressed the example of convicts in California being used as low wage TWA reservation clerks and strike breakers on a number of occasions. Yet, we find in attachment 5 at page 5 of the report, the inclusion of California Department of Youth Authority, Trans World Airlines project.

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[2] Flanagan, Timothy J., and Terence P. Thornberry, The Effect of Industry Employment On Offender Behavior: Final Report of the Prison industry Research Project, The Hindelang Criminal Justice Research Center, University at Albany, State University of New York, January 29, 1988. P. 89.

The convicts employed in this project are paid $5.67 per hour in 1990, according to this DOL/BJA report. This wage is half the national prevailing wage for similar work according to the DOL's own BLS study of wages in the airline industry a year earlier (Industry Wage Survey: Certificated Air Carriers, January 1989, U.S. Department of Labor, Bureau of Labor Statistics, March 1990, Bulletin 2356). BLS reported the national average for reservation clerks at Northwest Airlines earn over $18.00 per hour in the local southern California labor market. Northwest Airlines competes in some of the same national and international markets.

The law requires that convict labor receive wages not less than that paid for similar work in the locality. This well known example violates this law.

The above is one obvious and egregious example, but there are others that we have identified in the past. However, this one obvious example shows that the State Prison Industry Enhancement Programs do not comply with the prevailing wage requirements of the law.

What is more, it shows that the Department of Labor has falsely stated to Congress that the Prison Industry Enhancement Certification programs complies with the requirements set forth in Title 18 USC 1761(c).

Sincerely,

JOHN L. ZALUSKY
Head of the Office of Wages
and Industrial Relations
Economic Research Department

Senator WELLSTONE. Ms. Perry.

Ms. PERRY. Senator, thank you for including us in the hearing today.

My name is Sue Perry, and I represent the companies, the trade associations and the labor unions which make up the Prison Industries Reform Alliance, or PIRA.

PIRA was established in response to the ever increasing pressure that industry and labor are suffering from prison industries, both State and Federal.

While we understand that there is a potential impact of paying convict labor a minimum of prevailing wage, we want you to understand the impact that the unfair competition from prison industries is having on American business and on American labor.

Prison industries today have been restricted to a very limited number of products, and contrary to what Senator Reid said earlier, it is not just making license plates. In fact, in most State prisons, they are making products across the board, such as furniture and metal products; uniforms and other textile and apparel products including bulletproof vests and other body armor; they are making towels, sheets, blankets; metal products like industrial shelving, traffic signs, trays and carts. And in the Federal prison system, they are also making electronic cable and wiring harnesses that are used by the Department of Defense. They also produce such miscellaneous products as brooms and mops, eyeglasses, safety signs, paper products, and perform such services as printing, furniture refinishing and vehicle maintenance.

But still, that is a very limited number of products within the American industry. So the burden of the prison industries program is falling on these few select industries, and most of these industries are what you would call "niche industries." They can only sell to the Government. For instance, if you are looking at safety signs, such as stop signs and yield signs, there is no private sector market for that type of a product. So if you are allowing prisoners to

sell only those products that are bought by the Government, the people who make safety signs have nowhere else to go with their products.

Prison industries have two very distinct advantages over the private sector. In many instances in many States, they enjoy what we call a "super-preference," a mandated preference over any other groups whereby a purchaser must buy from prison industries before they can buy from anyone else, be it sheltered workshops, minority-owned businesses, or small businesses. And they also enjoy the benefit of low wages, no cost for a benefit program, and no Government-mandated programs or regulations.

In States where prison industries have no mandated preference, the combination of low wages and low overhead allows prison-made products to be less expensive than privately-made products, thus effectively eliminating competition from the private sector.

In States and the Federal system, where there is a mandatory preference or a "super-preference," prison-made products do not even have to be competitively priced with private sector products, and these prison industries truly have a captive market.

So what happens to these companies that find out that they cannot compete with prison industries because of their low wages, or because of their mandatory preference? Because they are traditional industries or "niche" industries, they really have no place else to go.

So what has happened in these companies is that they have had to lay off thousands of employees, and dozens of companies have gone out of business.

When Senator Reid testified earlier, he was talking about the fact that the taxpayer must pay the cost of keeping a prisoner in prison, that they have to pay for their housing, their shelter, their food, and their medical costs. Yet if a person who is working for a company such as Brill Furniture loses his job and is unable to find another job—which is typical within the industries that are being impacted—there is a cost to the taxpayer there.

In the State of Michigan, in Mason County, where Brill had to lay off 50 people—and Mr. Lange will talk about that—the 50 people who were laid off, the majority of them have now exhausted their unemployment benefits and have had to go on public assistance. With the example that Mr. Lange will explain, where the State saved money on the sale of furniture because it was less expensive to buy from Michigan State industries, they did end up paying on a public assistance cost for the people who have lost their jobs, almost $100,000 more than what they saved on buying the furniture from the State prison industries. So there is a cost, and the cost goes beyond just the economic dollar value to the dollars and cents that you are seeing having to be paid to the people who have lost their jobs.

Then you have the other problems that are related to unemployment, such as alcoholism, child and spousal abuse, and the other costs. And in fact, we have had cases where people who have lost their jobs to prison industries have decided that maybe the best way to stay in the furniture industry, or the uniform industry, or other industries, is to commit a crime and at least be able to make furniture or uniforms or whatever within the prison system.

So what do we do? We have one side that says we all agree that prisoners should work. They have to be kept busy. They should not be sitting around in air-conditioned cells, watching "Days of our Lives" on color television. We believe they should work. It is good to have them work; it teaches them a work ethic. They get up in the morning, they go to a job, they learn to get along with coworkers, and they learn to answer to a boss.

Yet the State and Federal people are telling us that you cannot afford to pay convicts minimum wage. And prison industries as they are now functioning are an unfair form of government competing with the private sector, and there are not enough self-use type jobs within the prisons to keep all the prisoners busy.

PIRA has been working for the last year on coming up with suggestions on what prisoners can be doing that would not impact the private sector. We have made these suggestions and recommendations during other hearings; we have done it at the recent Federal Prison Industries Summit, and we hope to soon make this presentation to the board of directors of FPI.

We believe that there are many problems in this country today that a little creativity and throwing some manpower at could solve. We are currently in the process of drafting legislation which would set up pilot programs within the Federal system at this time which would allow prisoners to work with local governments in the area of doing the "dirty" part of recycling. This would be things like sorting plastics, or tearing down old mattresses or furniture, or this type of work.

In the United States today, less than 2 percent of the plastic is being recycled because nobody wants to sort it. Yet at less than minimum wage, which prisoners will be paid, that is something that could be done because nobody else is doing it, yet it is something that benefits society that prisoners have actually hurt.

The same kind of a concept with mattresses or other similar products could be done using prison labor. This is a situation where prisoners——

Senator WELLSTONE. Ms. Perry, I am going to ask you to try to finish up fairly soon. It is excellent testimony, but I want to make sure I have time to ask questions before we have to conclude the hearing.

Ms. PERRY. Certainly. OK.

Senator WELLSTONE. It is excellent testimony, and I apologize for interrupting.

Ms. PERRY. This is a situation, though, where prisoners who would not be paid minimum wage would not be doing minimum wage jobs.

We believe that minimum wage should be paid to inmates when prison industries compete with the private sector directly, when a person working the same job in the private sector, making the same product sold to the same customer, would be paid at least minimum wage.

Thank you.

[The prepared statements of Ms. Perry and Mr. Lange follow:]

PREPARED STATEMENT OF SUSAN E. PERRY

Mr. Chairman, members of the committee, I am Susan Perry, and I represent the companies, trade associations and labor unions which make up the Prison Industries Reform Alliance or PIRA. PIRA was established in response to the every increasing pressure that industry and labor are suffering from prison industries, both State and Federal.

I am testifying today on S. 1115 which would exempt all prison industries from the minimum wage requirements of the Fair Labor Standards Act. While we truly understand the potential impact that paying convict labor a minimum or prevailing wage would have on government and prison systems, we want you to understand the impact that the unfair competition of prison industries has on American business and American labor.

Because prison industries have been restricted to providing products used by government entities, they typically produce a limited range of products, which we refer to as "traditional products." These include furniture (office, and dorm and quarters furniture), textile and apparel products (towels, sheets, blankets, uniforms, bullet-proof vests and other body armor, underwear and footwear), metal products (metal furniture, industrial shelving, traffic signs, trays and carts) and, in the case of the Federal prison industries system, electronics and electrical wiring assemblies used in military products. They also produce other miscellaneous products such as brooms and mops, eyeglasses and other optics devices, paper products, safety signs, and perform services such as printing, furniture refinishing and vehicle maintenance.

Because of their limited assortment of products, the burden of the prison industries program rests on those few industries with which prison industries "compete." And it is impossible for these private sector companies to actually compete with prison factories and convict labor.

Prison industries programs have two distinct advantages over private sector companies: in many instances they enjoy a mandated preference over any other groups, whereby a purchaser must buy from prison industries before they can buy from anyone else, be it sheltered workshops, minority-owned businesses or small business; and, they enjoy the benefit of low wages, no costs for benefit programs, and no government mandated payments or regulations. In States where prison industries have no mandated preference, the combination of low wages and low overhead allows prison made products to be less expensive than privately made products, thus effectively eliminating competition from the private sector. In States and the Federal system where there is a mandatory preference, prison made products do not even have to be competitively priced with private sector products. These prison industries have a truly "captive" market.

So what happens to these companies when they find that they cannot compete with prison industries. Typically most of the "traditional industries" are made up of small businesses who have a "niche" product. Most depend on selling to Federal and State Governments by virtue of the very product they make. Most have lost significant sales to the ever increasing aggressive actions of prison industries. And, collectively, they have shut down dozens of businesses and terminated thousands of employees.

So what do we do? Prisoners must work to keep busy. State and Federal Governments cannot afford to pay convict labor minimum wage. Prison industries as they now function are an unfair form of government competing with the private sector. And, there are not enough "self use" type jobs to keep enough prisoners occupied.

PIRA has made suggestions during hearings and at the recent Federal Prison Industries Summit (and soon the FPI Board of Directors) as to ways to keep prisoners occupied without displacing American workers and harming American business. We believe that there are many problems in this country that using some creativity and convict manpower can help solve. We are currently drafting legislation which would set up pilot programs where prisoners would work with local governments in specific areas of recycling. Such areas would include sorting plastics, tearing down old mattresses and disassembling furniture. These, and similar projects are not being done by the private sector because it is not profitable if a company has to pay minimum wages. But, at prison wages, these types of projects can be done. And not only do they keep prisoners employed and teach them a basic work ethic, they are projects which benefit society.

With these limited exceptions, we ask that this legislation be "reversed"—that minimum wages should be paid to inmates when prison industries compete with the private sector; when a person working the same job in the private sector, making the same product sold to the same customer, would be paid at least minimum wage. Thank you.

PREPARED STATEMENT OF DENNIS LANGE, VICE PRESIDENT AND GENERAL MANAGER, BRILL MANUFACTURING COMPANY

Mr. Chairman and members of the committee, good afternoon, my name is Dennis Lange. I am the vice president and general manager of Brill Manufacturing Company, a small manufacturer of residential, dorm, and restaurant furniture located in Ludington, MI. I am here today in opposition to S. 1115, and wish to relate our company's experience "competing" with State prison industries, where inmates are paid substantially less than minimum wages.

In November, 1992, Brill, along with 22 other furniture manufacturers, bid on providing dormitory furniture to Michigan State University. The University needed around 1,600 dorm rooms of furniture which included bunk beds, desks, bookcase tops, chests of drawers and desk chairs.

Our bid came in as the low bid at $910,000, yet, because of its ridiculously low labor cost, Michigan State Industries, a prison work program using convict labor, was able to underbid us by almost 20 percent. Of course, they were awarded the job.

The impact of this specific job going to prison industries was devastating to our company. We have supplied dorm furniture to Michigan State University for the past 9 years, almost since we entered the dorm furniture market. Of the 65 employees we had prior to losing this job, only 15 are still working for us. The people that we were forced to let go have now exhausted their unemployment benefits, and the majority of them have had to turn to public assistance, at a significant cost to the State of Michigan.

Our small community of Ludington, Michigan has also felt this loss of employment. You should understand that furniture manufacturing is a "multiplier" industry; that each job in the factory provides between three and five jobs in the private sector. While prison industries does purchase raw materials from the private sector, just as my company does, the wages paid to inmates do not enter the local community as the wages paid to our workers do. In addition, inmates do not pay taxes, so by eliminating taxpaying workers you are, of course, eliminating the taxes paid by those workers.

I would like to enter into the record a letter from the mayor of our town of Ludington, MI.

At Brill we pay our workers between $5.65 and 8.00 PER HOUR. WE PROVIDE HEALTH INSURANCE, PAID VACATION, AND OTHER BENEFITS. WE PAY FOR GOVERNMENT MANDATED BENEFITS SUCH AS WORKERS COMPENSATION, FICA, AND UNEMPLOYMENT COMPENSATION. WE ARE REQUIRED TO MEET HEALTH, SAFETY AND ENVIRONMENTAL GOVERNMENT REGULATIONS. AND WE PAY TAXES!!!

We cannot compete with a government program that does not have the same kinds of costs that we have.

We recognize that prisoners should work. We recognize the potential benefit from teaching good work habits to inmates. They should be employable once released from prison. We are also aware of the projected increases in prison populations due to stricter sentencing and stepped-up drug related convictions. But prison work programs should not be at the expense of small companies like ours. Our workers have committed no crime, have broken no laws: they have worked hard and played by the rules. Yet they are the ones paying for these prison work programs with their very livelihood. THIS IS NOT FAIR!

There must be a way to help us in this situation. I ask that you consider the impact that convict labor has on small businesses like ours, and provide legislation that will help us too, not just the prison system. Thank you.

Senator WELLSTONE. Mr. Lange, Ms. Perry said that you may want to add something to the testimony.

Mr. LANGE. Thank you for allowing me to be here this afternoon. I just have a few comments I would like to add if I may. It involves our company. We are a small company in a very small town in Michigan.

We were bidding on a large university job last November. We were among 22 private companies that were bidding on this project. We were low bid of the 22 private companies. However, Michigan prison industries came in with a much lower bid than ours. Of course, we lost the contract.

It was devastating for our company. It was right before Christmas. We had to lay off the majority of our work force. The day I

had to call these employees in and tell them their jobs were terminated, I tried to explain to them that they did not lose their jobs because of poor workmanship or because they could not compete with private industry. I had to tell them we could not compete with prison labor.

Needless to say, they were quite upset and very angry. They could not believe they were losing their jobs to convicts. They did not commit any crime. They did not do anything wrong, but they felt that they were being punished.

One of their fringe benefits—which is quite a broad topic today, even here—is health benefits. Our employees received health benefits for themselves and their families. Of course, after this layoff, we could no longer continue to pay for these benefits. Most of our employees are not on a subsidy of some type with the State.

We live in a small town of approximately 9,000 people. There really is no place else in our community where they can find work. We feel it is very unfair, and we feel it is unfair if the prison industries are allowed to continue to pursue this type of action anywhere they wish to go.

We need your help. After being in business for 47 years, we know how to do things right—but again, we cannot compete against the prisons.

Thank you very much.

Senator WELLSTONE. Thank you for your statement. I think it was a real addition to the testimony.

Mr. Angelone, how many prisoner complaints are lodged against the State each year, and of these, how many have involved FLSA matters?

Mr. ANGELONE. Well, currently, we have three in Nevada that are in the Federal courts right now. California has two, and the numbers grow. The problem is it just takes one case to go all the way through the court system that would be very detrimental to all State Government, as in the case in White Pine County and in Clark County, where inmates who are clerks in our school in the prison are asking for minimum wage.

Senator WELLSTONE. Of those three, how many are FLSA matters—all three?

Mr. ANGELONE. All three are that in Nevada.

Senator WELLSTONE. How many prisoner complaints altogether? That was a part A/part B question. Part A was how many complaints altogether, and part B was how many FLSA.

Mr. ANGELONE. How many inmate litigation lawsuits? Numerous. Too numerous to count.

Senator WELLSTONE. Do you have a record of that?

Mr. ANGELONE. I think Senator Reid said 40 percent of all litigation in Nevada's Federal court system is inmates. And there are thousands of court cases in Nevada.

Senator WELLSTONE. You said that the vast majority of correctional industry programs have developed product lines to reduce costs for local and State Government. Are you referring to products for actual State use?

Mr. ANGELONE. Yes, I am.

Senator WELLSTONE. You also seem to indicate in your testimony that there is a proposal to place prisoners working in such programs under the FLSA.

Mr. ANGELONE. I am sorry, Senator. I did not hear you.

Senator WELLSTONE. You also seemed to indicate in your testimony that there is a proposal to place prisoners working in such programs under the FLSA.

Mr. ANGELONE. No. We feel that the Prison Industry Enhancement Act provides prevailing wage for any inmate doing work in which interstate commerce is involved, and that FLSA is only providing minimum wage. We have not proposed that inmates be paid minimum wage, but prevailing wage, such as the PIE program demands.

Senator WELLSTONE. So you are not talking about a proposal—I thought in your testimony you referenced a proposal to place prisoners working in such programs under the FLSA. You were not trying to say that?

Mr. ANGELONE. No, Senator, I was not trying to say that.

Senator WELLSTONE. My point is that I do not know of any such programs.

Do you think that prisoners working behind prison walls, but for private industry, should not be covered by the FLSA?

Mr. ANGELONE. Again, Senator, I think the Prison Industry Enhancement Act states that prevailing wage would be paid, which in cases in Nevada, we have inmates who are paid more than minimum wage for working. They are paid the prevailing wage, which is set by our employment security department, and that is more than minimum wage.

Senator WELLSTONE. If that is the case, then why would you object to the FLSA coverage?

Mr. ANGELONE. As I said in my testimony, Senator, we have courts that are continuously listening to each inmate's lawsuit, and I am spending millions of dollars in the State of Nevada, as well as billions throughout the United States for all State and local correctional agencies, to go into court and fight these suits where inmates are asking for minimum wage in areas where they are not in the PIE programs. They are utilizing Fair Labor Standards under maintenance work, food service work, inmates working in the school building.

Senator WELLSTONE. In what ways, then, would the private industry be protected? I mean, isn't that part of the purpose of FLSA to protect private industry, as we've heard from some of the other testimony? Where do they fit in, then?

Mr. ANGELONE. With Senator Reid's bill, all he is asking is that inmates be excluded because, again, the Prison Industry Enhancement Act covers that any inmate working for a private vendor inside the walls will be supervised by agencies that will ensure that prevailing wage will be paid to these inmates who are working on interstate commerce goods.

Senator WELLSTONE. Mr. Zalusky, I was a teacher for many years, and I was reading your face; you were shaking your head. I missed Senator Reid's testimony, but apparently he sounded quite conciliatory as to seeing whether something could be worked out and thought that there maybe was too broad a reach in his word-

ing. So we may be able to work that out in any case. Not to try to get a sharp debate going between the two of you, but you seemed to be somewhat in disagreement, and I wanted to get your response.

Mr. ZALUSKY. I disagree strongly. The PIE programs have been an incredible example of noncompliance. They have gerrymandered the wage determination process. And there are well-modelled standards for determining wages under various prevailing wage laws—Davis-Bacon, the Service Contracts Act—indeed, the entire Federal wage structure is modelled on wage determinations. It is not a difficult science, and yet, when we look at prevailing wages that are "minimum wages," that they say are prevailing wages, they are almost invariably the minimum wage. If you go to Nevada, you cannot get a hamburger in a McDonald's served by a minimum wage worker. It is just not there. The clearing rate is much higher than that.

One of the statements that appears in this document, which is the May 1993 Bureau of Justice Assistance publication documenting and assessing selected private sector Prison Industries Enhancement Certification Programs reads as follows, on page 66: "The drapery shop," which incidentally would be Amalgamated Clothing Workers-type work, "employed 25 to 30 inmates in Nevada. They were paid piece rate," which is supposedly starting at the Federal minimum wage. I can assure you that in that industry, the prevailing wage is not the minimum wage. Second, there is probably no like work in that community.

These are people who filed a complaint, according to this document, against the State under the Fair Labor Standards Act, and they did that because they have a right of independent action. They do not have to wait for the Department of Labor to cause compliance. They complained not only about the minimum wage, but they complained apparently about the hours of work. The State closed the enterprise down. They found new prisoners—in other words, they fired these prisoners because they were uppity—and found new ones and now have reached out and found a new customer base, and they are trying to do the same thing again.

And this is not unique to Nevada. Minnesota, my home State, produces farm implements. It competes in Wisconsin. They have got good sense. They are not going to compete in Minnesota with prison-made goods. That is not where the voters are. You are going to get people angry. They gerrymandered the wage determination there under the PIE program by asking the State to do a wage survey including only the Stillwater area. Stillwater area is 35 miles from downtown St. Paul. It is part of the standard statistical metropolitan area. The PIE programs have been an example of violation of every part of that PIE program labor standards provisions. They are supposed to have regular meetings and consult with labor in the community. Most States do not. Minnesota did and then abandoned the meeting as soon as they got in a position of being able to say so and then did not have any further meetings. Now they are having meetings.

There is supposed to be no adverse impact on employment opportunities. None of this report, which goes on for pages and pages,

mentions adverse employment effects. All of these have an adverse employment effect.

We have strikebreakers used by TWA out of the PIE program in California. This is a service. It is not only a service in the Los Angeles market. They are competing against Northwest Airlines, which pays $18.75 an hour, and they are paying $6 an hour. And that is in international commerce, which causes the other countries to pay attention to this. And yesterday, the U.S. Trade Representative said China was objective to our trade practices because we are using convict labor making jeans and competing with them. We are charging them under the Most Favored Nations clause for their activity with convict labor.

We cannot have it both ways, Senator.

Senator WELLSTONE. I want to ask Mr. Angelone—I am good at reading faces, and you did not see to agree, so I just wanted to give you an opportunity to respond very briefly.

Mr. ANGELONE. Thank you, Mr. Chairman.

I want to disagree with two things that were said. Senator Reid earlier did State that there is always a compromise. Look at the bill, and if the bill is too intrusive, he can work on it. And I defend that 100 percent, that whatever can be worked out can be.

In reference to this report, I have not seen it, but I know that out at Ely, the inmates have filed a lawsuit. They were never there when the drapery factory was in operation. They were there working, setting it up, and they had made threats in the institution, one of them to cut his fingers off while doing it so that he could collect workmen's compensation. He was let go from the job for that reason. He was never there when the operation was in force. He did write chilling letters to every customer, stating that every law was being broken, or whatever he wanted to say, at which time he had no knowledge of what was happening inside the drapery factory and did cause it to be trimmed back, but never closed. The same inmates were working there on smaller projects.

One thing I agree with fully—listening to people in labor, I am not someone who is telling you that I think inmates deserve a better right in life than anybody who is either sitting at this table or is responsible for the livelihoods of people out in the world. But I do feel that taxpayers' dollars are being spent on frivolous lawsuits that I have to spend every day in Federal court over, dealing with inmates who are suing over the wording of the law rather than the intent. And all I feel that Senator Reid was doing was saying let us make the wording and the intent there so that judges in the Federal courts have a clear, concise way to stop lawsuits before they cost the taxpayers at the State level millions of dollars.

Senator WELLSTONE. Mr. Zalusky, did you want to respond? If not, I would like to move to Ms. Perry. I do not want to keep this going if everyone's had an opportunity to share their views.

Mr. ZALUSKY. I think we can close it off fairly quickly. I obviously disagree with him. I do not have any first-hand knowledge of what took place out there and whether this person threatened to cut his fingers off or not.

But I would suggest to you that there is a person there who is not happy with working. This is not a happy worker.

There has to be a line between what is slave labor, what is voluntary labor, what is free labor, and what is not. This is what we are charging the Chinese with, is compulsory labor. I think in the Fair Labor Standards Act, fair wages is part of that process.

Senator WELLSTONE. Let me ask you just two questions, Ms. Perry—and by the way, I think there may be, given the late afternoon Thursday and other conflicts, other members of the committee who would like to submit written questions.

You talked about this some, but let me focus on it again. How extensive is the displacement of workers because of prison industries?

Ms. PERRY. We are attempting to get a handle on that. It is very hard, because when a person is fired or laid off, they are not told, "You lost your job because of convict labor." There are too many other economic considerations right now with the ongoing recession or whatever it is right now.

But even if you were to say, okay, there are 62,000 convicts working in prison factories, let us say they are only 50 percent effective. Let us say they work at half the efficiency of the private sector. You have displaced 31,000 in the private sector. You can take it down, but the question becomes how many is too many.

I would say the guy who lost his job at Brill thinks he is the one that is too many.

Senator WELLSTONE. Yes. Well, Mr. Lange gave an example of where the employees did know the reason that they lost their jobs, as an example.

Ms. PERRY. Oh, absolutely, they knew.

Senator WELLSTONE. Isn't Ashurst-Sumners sufficient to protect businesses and workers?

Ms. PERRY. I am not a lawyer.

Senator WELLSTONE. If it will put you at ease, I am not a lawyer either.

Ms. PERRY. Well, I am not a lawyer, so I am not sure if it really would. And listening to Senator Reid, I was pleased to see that he was willing to make some changes on it—the PIE program being one perfect example. I think work release programs is another example. We have been involved in working with Federal prison industries, and they are making recommendations that they be allowed to sell into the private sector and be excluded from any restriction imposed by law on the sale of items because they are produced by prison labor. I think they absolutely have to be paying prevailing wages if they ever get out into the private sector, which I should go on record as saying we oppose them getting into the private sector at all.

But there are a lot of situations where prisoners are doing work where they should not compete with the private sector. And more than the minimum wage issue, I think that that is absolutely the issue, that they should not be competing with the private sector, and they should not be taking jobs away from American workers.

Senator WELLSTONE. Mr. Lange, we are going to try to finish up at 4:30, but you have come a long way, and I wonder on the basis of what you have heard, whether there are some additional points that you would like to make in terms of your own perspective?

What you said, you said with a considerable amount of eloquence, but I just want to give you this opportunity.

Mr. LANGE. Thank you very much.

I truthfully do not know what the answer is, but I know as a small businessman who is very familiar with the operation that I am in, that I cannot compete with a State agency that does not have to pay the same benefits, the same Federal/State mandates, the same clean air, the same health benefits, as I do.

I do not know what the answer is. I feel that it is unfair not only to us, but also to all of my employees. I wish I had an answer. I hope somebody can come up with one. We need help.

Senator WELLSTONE. Well, it does sound like—and again I apologize because I was not here at the beginning of the hearing—but it does sound like, while I do not think anybody thinks it is an easy question; everybody that I talk with here in the Senate feels as if this is really tough—but given what you all have said and given the way it started out, it sounds to me like people are going to try to see if something can be worked out, because I think the points that have been made here are powerful and important.

Did you want to add something, Ms. Perry?

Ms. PERRY. I have Bob Johnston with me. He is on the PIRA steering committee and also represents Herman Miller Furniture Company. They are a large manufacturer of office furniture, as opposed to Mr. Lange's company, which is a small manufacturer of dorm furniture. We had done some work, and off the top of my head, I could not remember the numbers, but within the Federal prison industries system last year, they sold $124 million worth of furniture, which displaced at the average wages in west Michigan, where Bob is from, displaced 5,000 workers.

Senator WELLSTONE. Five thousand?

Ms. PERRY. Five thousand workers.

And I am going to take one more second. I feel like I am adding on to an essay question now. You should understand that furniture manufacturing and most of these industries that are being pressured by prison industries have what is called a multiplier effect. That is, for every one person working in the furniture industry, there are typically two to five people out in the private sector who are then working due to what they are being paid, be it the people who are administering their benefits, be it the guy down at McDonald's who is flipping hamburgers or taking orders, be it the guy at the gas station, and so on.

So it does have a major impact on these small communities, where companies are literally going out of business.

Senator WELLSTONE. I would like to thank each of you for coming all the way here to testify. I think your testimony was very important, and I apologize that I did not get a chance to hear everyone earlier today, including Senator Reid.

Thank you. This concludes our hearing.

[Whereupon, at 4:30 p.m., the committee was adjourned.]

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